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In the Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES IN ANSWER TO CALIFORNIA'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

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INDEX

	Page
Questions presented	1
Statute involved	3
Statement	3
Summary of argument	11
Argument	16
I. The Submerged Lands Act has not made the Special Master's Report obsolete	16
A. The boundary established by the Submerged Lands Act depends on the same elements of ordinary low-water line and outer limit of inland waters that were in issue before the Special Master	16
B. The Submerged Lands Act has given no new significance to California's claim of an "historic boundary"	23
C. The fact that the Submerged Lands Act establishes a new date for determination of the location of the coast line does not make the Special Master's Report obsolete	26
II. California's exceptions to the report of the Special Master should be overruled	30
A. The Special Master correctly stated and applied the rules governing the delimitation of "inland waters" for the purposes of the present case	32
1. The case is controlled by the rules followed by the United States on May 22, 1953, in delineating the inland waters of the United States for the purposes of international relations	32
2. The determinations of the Executive Branch concerning the principles to be followed in delimiting the inland waters of the United States for purposes of international relations are binding in domestic judicial proceedings	36

733-890—64——1

Argument—Continued
II. California's exceptions, etc.—Continued
A. The Special Master, etc.—Continued
2. The determinations, etc.—Continued
a. The inland waters of the United States cannot extend beyond the inland waters claimed by the United States in the conduct of international relations ..... Page 36
b. The principles established by the policy and practice of the Executive Branch for fixing the inland waters of the United States are binding in domestic judicial proceedings 39
c. The principles established by the policy and practice of the Executive Branch for fixing the inland waters of the United States are subject to judicial notice 42
d. The declarations of the Department of State are a conclusive statement of the principles for fixing the inland waters of the United States .. 43
e. The declarations of the Department of State correctly set forth the principles historically followed by the Executive Branch in the conduct of international relations 48
3. The declarations of the Department of State and the historical evidence show that the report of the Special Master correctly stated the principles followed by the United States in delimiting inland waters for international purposes .. 49
a. Territorial waters begin at low-water line on relatively straight coasts .. 51

Argument—Continued
II. California's exceptions, etc.—Continued
A. The Special Master, etc.—Continued
3. The declarations, etc.—Continued
b. On coasts with minor curvatures territorial waters begin at low-water line and not at straight baselines.. Page 53
(1) The State Department's statement of the position of the United States..... 53
(2) The historical materials support the State Department's statement..... 54
(3) The materials cited by California do not refute the State Department's statement..... 63
c. Until 1961 the United States claimed nonhistoric bays as inland waters only where they were substantial indentations and could be enclosed by a line not over ten geographical miles long..... 65
(1) The State Department's statement of the position of the United States..... 65
(2) The historical materials support the State Department's statement..... 69
(a) Background..... 69
(b) Actions of the United States..... 75
(3) The materials cited by California do not refute the State Department's statement..... 91
(a) General expressions..... 91
(b) Particular bodies of water. 99
(c) Judicial decisions..... 113
(d) Legal writings..... 117
d. Rivers flowing directly into the sea are inland waters whatever their width.....

Argument—Continued
II. California's exceptions, etc.—Continued
A. The Special Master, etc.—Continued
3. The declarations, etc.—Continued
Page
e. Territorial waters begin at low-water line around islands and within straits that connect areas of high seas 119
(1) The State Department's statement of the position of the United States 119
(2) The historical materials support the State Department's statement 121
(a) The Strait of Canso 121
(b) The Danish Sound, Great Belt and Little Belt 126
(c) Shimonoseki Strait 129
(d) Straits of Magellan 130
(e) Straits leading to inland waters 130
(f) Islands 131
(g) 1930 Conference 132
(h) Other authorities 133
(3) The materials cited by California do not refute the State Department's statement 138
f. Waters over which the national government has historically exercised jurisdiction as inland waters are not subject to the foregoing geographical principles 141
4. The Special Master correctly ruled that none of the disputed areas was inland waters as determined according to the geographical criteria followed by the United States in the conduct of foreign relations 141

Argument—Continued
II. California's exceptions, etc.—Continued
Page
B. No other legal principle sustains the claims of California 145
1. The 24-mile closing line of the Convention on the Territorial Sea and the Contiguous Zone does not apply to this case. 146
a. California is not entitled to the benefit of new principles of international law adopted after May 22, 1953 ... 146
b. Only Monterey Bay, of the areas claimed by California, would become inland waters if the 24-mile closing line applied 150
2. California is not entitled to the waters which could be enclosed by straight baselines 155
3. No special characteristics of the Pacific Coast warrant an exception from established geographical criteria 159
4. California's claims are not justified on historic grounds 160
a. The United Nations studies of historic waters do not conflict with the Special Master's findings 163
b. There has not been the necessary exercise of sovereignty by the United States over any of the disputed areas 163
(1) An historic claim requires an effective exercise of sovereignty by the national government 163
(2) The United States has not exercised sovereignty over the disputed areas 170
c. California has not historically exercised sovereignty over the disputed areas 171
(1) Character of the necessary action 171

Argument—Continued
II. California's exceptions, etc.—Continued
B. No other legal principle, etc.—Continued
4. California's claims, etc.—Continued
c. California, disputed areas—Continued Page
(2) State and county boundaries... 173
(3) Santa Monica city limits..... 175
(4) Fish and game districts..... 176
(5) Adjudications..... 177
C. The line of mean low water is the proper base-line from which to measure California's three-mile belt of submerged lands where the shore meets the open sea..... 178
Conclusion..... 182
Appendix A:
1. *United States* v. *California;* Order and Decree, October 27, 1947, 332 U.S. 804, 805..... 1a
2. Submerged Lands Act, May 22, 1953, 67 Stat. 29, 43 U.S.C. 1301–1315..... 1a
3. Letter of November 13, 1951, from James E. Webb, Acting Secretary of State, to J. Howard McGrath, Attorney General..... 6a
4. Letter of February 12, 1952, from Dean Acheson, Secretary of State, to J. Howard McGrath, Attorney General..... 11a
5. Letter of May 28, 1886, from Thomas F. Bayard, Secretary of State, to Daniel Manning, Secretary of the Treasury, 1 Moore, *Digest of International Law* (1906) pp. 718–721..... 13a
Appendix B:
Legislation establishing the boundaries of California's coastal counties..... 19a

CITATIONS

Cases:

	Page
Anna, The, 5 Rob. Adm. 373	139
Artic Maid Fisheries v. *State of Alaska*, No. 316, S. Ct. of Alaska	100
Baiz, In re, 135 U.S. 403	44
Bangor, The [1916] Prob. 181	130
Banks v. *Ogden*, 2 Wall. 57	28
Barney v. *Keokuk*, 94 U.S. 324	28
Borax, Ltd. v. *Los Angeles*, 296 U.S. 10	179
Chicago & S. Air Lines v. *Waterman Corp.*, 333 U.S. 103	39
Chinese Exclusion Case, 130 U.S. 581	166
Commonwealth v. *Peters*, 12 Metcalf (53 Mass.) 387	71
Compania Espanola v. *Navemar*, 303 U.S. 68	46
Cooper, In re, 143 U.S. 472	41, 113
Corfu Channel Case, I.C.J. Reports 1949, p. 4	135, 152
County of St. Clair v. *Lovingston*, 23 Wall. 46	28
Cunard S. S. Co. v. *Mellon*, 262 U.S. 100	92
Direct United States Cable Company v. *Anglo-American Telegraph Company*, (1877) L.R. 2 A.C. 394	69, 73
Downes v. *Bidwell*, 182 U.S. 244	167
Duff Development Co. v. *Kelantan Government*, L.R. (1924) A.C. 797 (H.L.)	47
Dunham v. *Lamphere*, 3 Gray (69 Mass.) 268	71
Engelke v. *Musmann*, L.R. (1928) A.C. 433 (H.L.)	47
Fagernes, The, L.R. (1927) P. 311 (C.A.)	38, 42, 47
Fisheries Case (*United Kingdom* v. *Norway*), I.C.J. Reports, 1951, p. 116	37, 41, 44, 62, 75, 116, 154, 155, 156, 157
Foster v. *Globe Venture Syndicate*, L.R. (1900) 1 Ch. 811	47
Foster v. *Neilson*, 2 Pet. 253	40
Hamburgh American Steam Navigation Co. v. *North of Scotland Banking Company—The "Eclipse" and the "Saxonia"*, 15 Moore P.C. 262	133
Hines v. *Davidowitz*, 312 U.S. 52	166
Hitz, Ex parte, 111 U.S. 766	48
Holmes v. *Jennison*, 14 Pet. 540	166
Hooker v. *Raytheon Company*, 212 F. Supp. 687	178
Jefferis v. *East Omaha Land Co.*, 134 U.S. 178	28
Jones v. *Johnston*, 18 How. 150	28

Cases—Continued

Page

Jones v. *United States*, 137 U.S. 202 ..... 40, 42, 49
Kennett v. *Chambers*, 14 How. 38 48
Lattimer v. *Poteet*, 14 Pet. 4 166
Mahler v. *Norwich and New York Transportation Company*, 35 N.Y. 352 108
Manchester v. *Massachusetts*, 139 U.S. 240 ..... 72, 169
Marincovich, In re, 48 Cal. App. 474, 192 Pac. 156 .. 134, 177
Mighell v. *Sultan of Johore*, L.R. (1894) 1 Q.B. 149 (C.A.) 47
Miller v. *United States*, 88 F. 2d 102 114
Minquiers and Ecrehos Case, I.C.J. Reports 1953, p. 47 .. 168
Muchenberger v. *City of Santa Monica*, 206 Cal. 635, 275 Pac. 803 177
Muir, Ex parte, 254 U.S. 522 46
Mundell v. *Lyons*, 182 Cal. 289, 187 Pac. 950 ..... 24a, 29a
New Orleans v. *United States*, 10 Pet. 662 28
Ocean Industries v. *Greene*, 15 F. 2d 862 171
Ocean Industries v. *Superior Court*, 200 Cal. 235, 252 Pac. 722 ..... 170, 174, 19a
Pearcy v. *Stranahan*, 205 U.S. 257 40
People v. *Hecker*, 179 Cal. App. 2d 823, 4 Cal. Reptr. 334 .. 28
People v. *Stralla*, 14 Cal. 2d 617, 96 P. 2d 941 .. 111, 116, 170
Peru, Ex parte, 318 U.S. 578 ..... 39, 46
Pollard v. *Hagan*, 3 How. 212 ..... 4, 117, 172
Republic of Mexico v. *Hoffman*, 324 U.S. 30 39
Rex v. *Forty-Nine Casks of Brandy*, 3 Hagg. Adm. 257, 166 Eng. Rep. 401 72
Rex, Inc. v. *Superior Court*, 34 Cal. App. 2d 96, 93 P. 2d 182 170
Rose v. *Himely*, 4 Cranch 241 115
St. Croix River Arbitration, 1797, 1 Moore, *International Adjudications, Modern Series*, 162 168
Stevens v. *Arnold*, 262 U.S. 266 28
Suttori v. *Peckham*, 48 Cal. App. 88, 191 Pac. 960 .. 134, 177
United States v. *Belmont*, 301 U.S. 324 166
United States v. *Benner*, 24 Fed. Cas. No. 14,568 ..... 45, 49
United States v. *California*, 332 U.S. 19 ..... 3, 33, 41, 72, 112, 166
United States v. *California*, 332 U.S. 804 ..... 3, 16, 17, 34, 178, 1a
United States v. *California*, 334 U.S. 855 4

Cases—Continued

	Page
United States v. *California*, 337 U.S. 952	5
United States v. *California*, 342 U.S. 891	4, 5, 18
United States v. *California*, 344 U.S. 872	6
United States v. *California*, 375 U.S. 927	10
United States v. *Carrillo*, 13 F. Supp. 121	113, 170
United States v. *Curtiss-Wright Corp.*, 299 U.S. 304	167
United States v. *Liddle*, 26 Fed. Cas. No. 15,598	46, 48, 49
United States v. *Louisiana*, 363 U.S. 1	56, 117, 138, 182
United States v. *Ortega*, 27 Fed. Cas. No. 15,971	46, 49
United States v. *Pink*, 315 U.S. 203	166
United States v. *State of Alaska*, Civ. No. A-51-63, U.S. Dist. Ct., D. Alaska	101
United States v. *Turner*, 175 F. 2d 644 certiorari denied, 338 U.S. 851	154
Vermilya-Brown Co. v. *Connell*, 335 U.S. 377	39, 47
Washington, The, S. Exec. Doc. No. 103, 34th Cong., 1st Sess., 170 (Cong. Doc. Ser. No. 824)	77
Wilmington T. Co. v. *Railroad Commission*, 166 Cal. 741, 137 Pac. 1153, affirmed, 236 U.S. 151	134, 177
Wilmington Transp. Co. v. *Cal. R.R. Comm.*, 236 U.S. 151	134, 177
Ziffrin, Inc. v. *United States*, 318 U.S. 73	30
United States Statutes and Treaties:	
1 Stat. 29, 32	109
Act of April 30, 1790, sec. 25, 1 Stat. 112, 117-118	45
Act of February 26, 1881, 21 Stat. 351	107, 108
Act of Mar. 3, 1887, 24 Stat. 475, 46 U.S.C. 143	125, 130
Act of Mar. 2, 1889, 25 Stat. 1009	113
Death on the High Seas Act, 46 U.S.C. 761-768	178
Joint Resolution of Jan. 18, 1865, 13 Stat. 566	78
Joint Resolution of March 3, 1883, 22 Stat. 651	81
Outer Continental Shelf Lands Act:	
sec. 2(a), 67 Stat. 462, 43 U.S.C. 1331(a)	16
Submerged Lands Act, May 22, 1953, 67 Stat. 29, 43 U.S.C. 1301-1315	3, 8, 16, 147, 1a
sec. 2 (43 U.S.C. 1301)	9, 18, 20, 24, 25, 27, 96, 178, 2a
sec. 3 (43 U.S.C. 1311)	18, 24, 3a
sec. 4 (43 U.S.C. 1312)	27, 4a
sec. 5 (43 U.S.C. 1313)	4a
sec. 9 (43 U.S.C. 1302)	16, 5a

United States Statutes and Treaties—Continued

18 U.S.C. — Page

371 — 114
1651 — 114
1659 — 114
2276 — 114

18 U.S.C. (1934 ed.)

88 — 114
481 — 114
489 — 114
490 — 114

Convention on the Territorial Sea and the Contiguous Zone (U.N. Doc. A/CONF.13/L.52), 106 Cong. Rec. 11174–11177 — 30, 35, 147
106 Cong. Rec. 11174–11175 — 94
106 Cong. Rec. 11176 — 147
Art. 3, 106 Cong. Rec. 11174 — 181
Art. 4, 106 Cong. Rec. 11174 — 37, 62, 155, 159
Art. 7, 106 Cong. Rec. 11174 — 68, 110, 141, 148, 150
Art. 8, 106 Cong. Rec. 11174 — 36
Art. 10, 106 Cong. Rec. 11174 — 138
Art. 16, 106 Cong. Rec. 11175 — 137, 138

Treaty of Paris (American Independence), Sept. 3, 1783, 8 Stat. 80 — 138
Art. III, p. 82 — 76

Treaty of Washington (Great Britain), May 8, 1871, 17 Stat. 863 — 79
Arts. XVIII–XXI, pp. 869–870 — 79
Arts. XXII–XXV, pp. 870–872 — 80
Art. XXXIII, p. 874 — 80, 81

Treaty with Cuba, Mar. 4, 1926, 44 Stat. 2395 — 59

Treaty with Denmark, Apr. 26, 1826, Art. 5, 8 Stat. 341 — 126

Treaty with Denmark, Apr. 11, 1857, 11 Stat. 719 — 129

Treaty with Germany, May 19, 1924, 43 Stat. 1816 — 59

Treaty with Great Britain, Oct. 20, 1818, 8 Stat. 248 — 99
Art. 1 — 76

Treaty with Great Britain (Canadian Boundary), June 15, 1846, 9 Stat. 869 — 102

Treaty with Great Britain, Feb. 8, 1853, 10 Stat. 988 — 77

Treaty with Great Britain (Reciprocity), June 5, 1854, 10 Stat. 1089 — 78, 125

United States Statutes and Treaties—Continued Page
Treaty with Great Britain, Jan. 24, 1903, 32 Stat. (Pt. 2) 1961 89
Treaty with Great Britain, Apr. 4, 1908, 35 Stat. (Pt. 2) 1960 85
Treaty with Great Britain, Jan. 27, 1909, 36 Stat. (Pt. 2) 2141 ..... 85, 126
p. 2142 86
pp. 2146–2147 126
Treaty with Great Britain, July 20, 1912, 37 Stat. (Pt. 2) 1634 ..... 88, 99
Treaty with Great Britain, Jan. 23, 1924, Art. 1, 43 Stat. 1761 58
Treaty with The Netherlands, Aug. 21, 1924, 44 Stat. 2013 59
Treaty with Panama, June 6, 1924, 43 Stat. 1875 59
Treaty with Russia (Alaska Cession), Mar. 30/18, 1867, 15 Stat. 539 ..... 89, 113
Unratified Treaty with Great Britain, Feb. 15, 1888, S. Misc. Doc. No. 109, 50th Cong., 1st Sess., 155, 156 (Cong. Doc. Ser. No. 2517) 84
Art. IV, pp. 156–157 84
California Constitutions and Statutes:
California Constitution of 1849
Art. XI, Sec. 4 174
Art. XII 173
California Constitution of 1879:
Art. XXI, Sec. 1 173
Calif. Stats. 1850:
c. 15, § 2, p. 58 ..... 20a
c. 15, § 3, p. 59 ..... 23a
c. 15, § 4, p. 59 ..... 27a
Calif. Stats. 1851:
c. 14, § 2, p. 172 ..... 20a
c. 14, § 3, p. 172 ..... 24a
c. 14, § 4, p. 173 ..... 27a
Calif. Stats. 1852:
c. 133, p. 218 ..... 28a
Calif. Stats. 1856:
c. 46, § 1, p. 53 ..... 24a
Calif. Stats. 1871–72:
c. 351, p. 484 ..... 26a

California Constitutions and Statutes—Continued
Calif. Stats. 1889: Page
c. 110, § 2, p. 123 22a
Calif. Stats. 1919:
c. 470, p. 877 24a
c. 470, § 57, p. 908 26a
Calif. Stats. 1923:
c. 160, § 31, p. 354 23a
c. 160, § 38, p. 361 22a
c. 160, § 43, p. 365 29a
Calif. Fish and Game Code (1933) 176
Calif. Govt. Code
§§ 170–172, Calif. Stats. 1949, c. 65, pp. 82–83 173
23075, Calif. Stats. 1947, c. 424, p. 1041 21a
23119, Calif. Stats. 1947, c. 424, p. 1055 25a
23130, Calif. Stats. 1947, c. 424, p. 1063 23a
23137, Calif. Stats. 1947, c. 424, p. 1069 22a
23142, Calif. Stats. 1947, c. 424, p. 1072 29a
23156, Calif. Stats. 1947, c. 424, p. 1078 26a
Calif. Political Code:
Pt. IV, Tit. I, Ch. I 21a
§ 3907 (1872) 21a,24a,28a
§ 3927, Calit. Stats. 1923, c. 160, § 20, p. 343 25a
§ 3938, Calif. Stats. 1919, c. 470, § 31, p. 888 22a
§ 3944 (1872) 21a
§ 3945 (1872) 24a
§ 3945, Calif. Stats. 1919, c. 470, § 38, p. 895 19a,21a
§ 3946 (1872) 28a
§ 3950, Calif. Stats. 1919, c. 470, § 43, p. 900 29a
§ 3964, Calif. Stats. 1923, c. 160, § 57, p. 373 26a
Santa Monica Freeholders' Charter, Calif. Stats. 1907, res. c. 6, p. 1007 175
Foreign Statutes and Treaties:
Merchant Shipping Act, 17 & 18 Vict., c. 104 134
North Sea Fisheries Convention, May 6, 1882, S. Exec. Doc. No. 113, 50th Cong., 1st Sess., p. 18 (Cong. Doc. Ser. No. 2512) 66
Art. II, p. 19 74
Treaty between Great Britain and France, August 2, 1839, 5 Hertslet, Commercial Treaties (1840) 89 73
Art. IX 73

Miscellaneous:

Page

Acts of the Conference for the Codification of International Law; Meetings of the Committees; Vol. III, Minutes of the Second Committee—Territorial Waters (L. N. Doc. C. 351(b). M.145(b). 1930. V; U.S. Ex. 3 for identification, Tr. 36–37):

p. 10 67
p. 179 60
p. 180 61
p. 197 60
pp. 197–199 ..... 61, 90
p. 198 68
p. 199 61
pp. 200–201 ..... 61, 132
p. 217 75
pp. 217–219 90
pp. 219–220 137

Addendum to the Second Report on the Regime of the Territorial Sea, International Law Commission, Fifth Session, 18 May 1953. English text, U.N. Doc. A/CN.4/61/Add.1, p. 7 and Annex, p. 4 149

Alaskan Boundary Arbitration; Proceedings of the Tribunal, 1903, S. Doc. No. 162, 58th Cong., 2d Sess. (Cong. Doc. Ser. Nos. 4600–4605) 89

vol. 4 (Cong. Doc. Ser. No. 4602), Pt. I, Counter Case of the United States, p. 32 106

vol. 5 (Cong. Doc. Ser. No. 4603), Pt. I, Argument of the United States, pp. 15–16 106

vol. 7 (Cong. Doc. Ser. No. 4605):

p. 611 107
p. 844 ..... 89, 107

Angell, *Tide Waters* 117

Bases of Discussion, League of Nations Conference for the Codification of International Law, vol. II—Territorial Waters (L.N. Doc. C. 74.M.39.1929.V):

No. 3 60
No. 6. p. 39 60
No. 7, pp. 39–45 75
No. 18, p. 63 61
p. 35 59
p. 36 60
p. 43 73
p. 45 110
pp. 143–144 60

Miscellaneous—Continued Page

Boggs, "Delimitation of the Territorial Sea," 24 *Am. Jour. Int. L.*, 541 68

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18 Cong. Rec. 930 125

19 Cong. Rec.:
5101–5102 85
6253–6254 85
6350–6353 85
6622 85
7289 85
7332–7333 85
7336–7338 85
7341 85
7718 85
7768 85

99 Cong. Rec.:
2618–2619 20
2630 28
2633 ..... 21, 97
2693 19
2697 28
2750 19
2756 21
2757 22
2917 25
2975–2977 25
3040 25
3273 25
3336–3337 25
3381 25
3549 25
3552–3553 25

Miscellaneous—Continued
99 Cong. Rec.—Continued
Page
3655 25
3885–3886 25
4085 25
4114 25
4114–4116 27
4115 25
4116 25
106 Cong. Rec. 11196 35
Diplomatic Correspondence of the United States, 1865, pt. 1:
p. 93 78
p. 184 78
p. 259 78
Fisheries Case (*United Kingdom* v. *Norway*), I.C.J., *Pleadings, Oral Arguments, Documents*, vol. 1, Memorial of the United Kingdom:
Page
pp. 62–63 74
pp. 65–66 74
p. 67 73
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514 160
516 160
Fulton, *Sovereignty of the Sea* (1911):
547–548 70
Fur Seal Arbitration. Proceedings of the Tribunal of Arbitration at Paris, 1893:
vol. 4, Appendix to the Case of the Great Britain, vol. 1, pp. 265, 268 (*40, *41–42) 140
vol. 12, Oral Argument for the United States, pp. 107–110 113
Grange, The, 1 Ops. A.G. 32 ..... 109, 167
H. Exec. Doc. No. 1, 38th Cong., 2d Sess. Pt. III, (Cong. Doc. Ser. No. 1218):
p. 542 129
p. 553 129
p. 596 129
H. Exec. Doc. No. 1, 39th Cong., 1st Sess., Pt. III, (Cong. Doc. Ser. No. 1246):
p. 229 129

Miscellaneous—Continued Page

H. Exec. Doc. No. 89, 45th Cong., 2d Sess., Vol. 1, (Cong. Doc. Ser. No. 1810):
pp. 120–121 ---- 79
H. Exec. Doc. No. 108, 33d Cong., 1st Sess. (Cong. Doc. Ser. No. 726), pp. 2–61 ---- 127
H. Exec. Doc. No. 186, 26th Cong., 1st Sess. (Cong. Doc. Ser. No. 366):
p. 14 ---- 122
p. 21 ---- 123
H. Rep. No. 2515, 82d Cong., 2d Sess. (Cong. Doc. Ser. No. 11578), pp. 17–18 ---- 157
Hale, *De Jure Maris* (Hargrave, *Collection of Tracts Relative to the Law of England* (1787) p. 10) ---- 70
Halifax Commission: Documents and Proceedings, H. Exec. Doc. No. 89, 45th Cong., 2d Sess., Vol. 1 (Cong. Doc. Ser. No. 1810) ---- 80
pp. 11–76 ---- 80
p. 76 ---- 81
p. 119 ---- 80
p. 120 ---- 80
p. 139 ---- 81
p. 166 ---- 81
Hearing, S. Committee on Foreign Relations, Conventions on the Law of the Sea, Executives J, K, L, M, N, 86th Cong., 2d Sess.
p. 2 ---- 155
p. 5 ---- 157
p. 13 ---- 157
p. 19 ---- 147
p. 21 ---- 157
p. 22 ---- 157
pp. 23–24 ---- 155
p. 82 ---- 37, 156
p. 84 ---- 37, 156
Hearings, S. Committee on Interior and Insular Affairs, S.J. Res. 13, 83d Cong., 1st Sess.
p. 32 ---- 19
pp. 460–462 ---- 98
p. 1052 ---- 98
Pt. 2, p. 1354 ---- 27

Miscellaneous—Continued

Page

14 Hertslet, *Commercial Treaties* (1880) 1055, 1057.... 74
Historic Bays (U.N. Doc. A/CONF.13/1), *United Nations Conference on the Law of the Sea; Official Records*, vol. 1, Preparatory Documents (U.N. Doc. A/CONF.13/37), pp. 1–38..... 161
pp. 4–6..... 110
Hudson, "The Twenty-eighth Year of the World Court," 44 *Am. Jour. Int. L.* (1950), 1–12..... 136
Hurst, "The Territoriality of Bays," 3 *British Yearbook of International Law* (1922–23), p. 42:
pp. 42–54..... 72
pp. 49..... 116
1 Hyde, *International Law* (2d ed. 1945)..... 100
p. 473..... 100
Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927):
p. 356..... 73
pp. 359–360..... 63
pp. 363–382..... 85
p. 367..... 85
Juridical Regime of Historic Waters, Including Historic Bays (U.N. Doc. A/CN.4/143)..... 161
p. 17..... 171
pp. 21–31..... 161
pp. 37–38..... 163
p. 39..... 164
pp. 39–40..... 164
p. 40..... 164, 171
pp. 42–44..... 164
p. 43..... 170
p. 44..... 170
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pp. 25–30..... 63

Miscellaneous—Continued Page

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Miscellaneous—Continued Page

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Miscellaneous—Continued

	Page
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pp. 767–874	76
pp. 783	77
pp. 792	76
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No. 2617	105
No. 2618	105
No. 2620	105
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p. 64	86
p. 93	86
p. 94	87
p. 97	87
pp. 97–98	88
p. 98	126
vol. 2, Appendix to the Case of the United States, Pt. 1 (Cong. Doc. Ser. No. 5930):	
p. 582	79
pp. 584–585	79
p. 611	79
pp. 613–614	79
vol. 3 (Cong. Doc. Ser. No. 5931):	
pp. 1043–1048	124
p. 1047	124
p. 1048	124
vol. 8 (Cong. Doc. Ser. No. 5936), Argument of the United States:	
p. 145	86
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Miscellaneous—Continued Page

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pp. 4–7 82

p. 7 82

p. 29 82

p. 46 82

pp. 48–52 82

pp. 56–57 83

pp. 56–65 82

p. 57 79

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pp. 1–17 84

p. 21 84, 85

p. 155 84

p. 156 84

Appendix E, pp. 137–147 85

Miscellaneous—Continued Page

S. Rep. No. 133, 83d Cong., 1st Sess. (Cong. Doc. Ser. No. 11659):
p. 2 ..... 25, 27
p. 4 27
p. 6 20
p. 14 21
p. 18 ..... 21, 96
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p. 38 67
pp. 38–39 68
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pp. 141–142 36
pp. 239 36
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No. 1109 109
No. 1115 110
No. 1211 108
No. 1270 154

Miscellaneous—Continued Page

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p. v---------- 57

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In the Supreme Court of the United States

OCTOBER TERM, 1963

NO. 5, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES IN ANSWER TO CALIFORNIA'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

QUESTIONS PRESENTED

California's exceptions to the Report of the Special Master present the following questions:

1. Whether the Submerged Lands Act has made the Special Master's report obsolete—

a. By adopting a different baseline from line of ordinary low-water and outer limit of inland waters identified by the Special Master; or

b. By giving any new significance to California's claim of an "historic boundary"; or

c. By requiring application of the legal rules in effect on the date of the Act, whereas the Special Master applied the rules in effect on the date of the decree, when in fact the same rules applied at both times; or

d. By requiring consideration of artificial structures in existence on the date of the Act, whereas

the Special Master would have considered artificial structures made at any time in the future.

2. Whether the Special Master was correct in taking "inland waters" to be those recognized as such by the United States for purposes of international relations.

3. Whether the principles followed by the Special Master in delimiting inland waters were the principles followed by the United States in its international relations; and particularly—

a. Whether the principles established by the policy and practice of the Executive Branch of the national government for fixing the inland waters of the United States are binding in domestic judicial proceedings;

b. Whether the principles so established are subject to judicial notice;

c. Whether the declarations of the Department of State are a conclusive statement of the principles for fixing the inland waters of the United States; or, if not,

d. Whether historical evidence shows that the declarations of the Department of State and the report of the Special Master correctly stated the principles followed by the United States to delimit its inland waters for international purposes:

(1) that bays, gulfs and estuaries could not qualify as inland waters—

(a) where they are more than 10 geographical miles wide at the entrance; or

(b) where the area enclosed is not comparable to the area of a semicircle; and

(2) that straits formed by islands could not be inland waters unless they are no more than 10 miles wide and lead only to inland waters.

4. Whether the disputed areas should be considered inland waters for the purposes of this case under any other legal principles—

a. Under the 24-mile closing line of the Convention on the Territorial Sea and the Contiguous Zone;

b. Under the principle of international law which would permit the United States to claim them as inland waters by enclosing them within straight baselines (assuming such to be the case); or

c. On the basis of any historic exercise of sovereignty over any of the disputed areas by the United States or by the State of California.

5. Whether the line of mean low water, rather than the line of mean lower low water, is the proper baseline from which to measure California's three-mile belt of submerged lands where the shore meets the open sea.

STATUTE INVOLVED

The pertinent provisions of the Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C. 1301 *et. seq.*, are set forth in Appendix "A", *infra,* pp. 1a–5a.

STATEMENT

The United States began this suit in 1945 to establish its right to the submerged lands and resources extending three miles seaward from the ordinary low water mark and outside the inland waters on the coast of California. By its opinion of June 23, 1947, 332 U.S. 19, and decree of October 27, 1947, 332 U.S. 804, the Court sustained the position of the United States, holding that although the States owned the tidelands

and lands under their inland navigable waters (*Pollard* v. *Hagan*, 3 How. 212), they did not own the bed of the territorial sea. The Court retained jurisdiction for such further proceedings as might be necessary.

On January 29, 1948, the United States petitioned for entry of a supplemental decree to delimit the lands awarded to the United States with more particularity in three areas where there was substantial oil-well activity. California answered that the areas indicated were in inland waters, and asked for appointment of a Special Master to fix the ordinary low water mark and outer limit of inland waters along the entire coast of California. The matter was referred to a Special Master, 334 U.S. 855, who recommended that the enquiry be limited to seven specified segments of the coast which were of immediate importance or provided situations typical of the problems found elsewhere along the coast. Report of May 31, 1949. After further proceedings, the Court on December 3, 1951, directed the Special Master to proceed in accordance with that recommendation, 342 U.S. 891.

The seven segments that the Special Master was thus directed to consider, as enumerated at page 2 of his Report of May 31, 1949, were as follows:

1. From Point Conception to Point Hueneme;
2. San Pedro Bay;
3. From the southern extremity of San Pedro Bay to the western headland at Newport Bay;
4. Crescent City Bay;
5. Monterey Bay;
6. San Luis Obispo Bay; and
7. Santa Monica Bay.

That list was repeated, with a statement of the positions of the parties as to each segment, as Appendix I to the Report of Special Master (under Order of June 27, 1949[a]), dated May 22, 1951, at pages 38–44. The first three segments were those included in the United States' petition for a supplemental decree, and maps of them were included as appendices to that petition. Somewhat less detailed maps of all seven segments appear in the Appendix to California's present Brief in Support of Exceptions, opposite pages 94 (Point Conception to Point Loma, embracing segments 1, 2, 3, and 7), 104 (two maps of San Pedro Bay, but showing its eastern limit farther east than we think proper), 132 (Santa Monica Bay), 148 and 150 (Crescent City Bay), 152 (Monterey Bay), and 180 (San Luis Obispo Bay).[1]

The questions submitted to the Special Master were (1) whether the waters between the mainland and islands were inland waters, and if so, by what criteria the limits of such inland waters should be determined; (2) whether particular segments were bays or harbors constituting inland waters, and from what landmarks should be drawn the limits of inland waters in bays, harbors, rivers, and other inland waters; and (3) by what criteria should the ordinary low water mark on the coast of California be ascertained. 342 U.S. 891.

[a] *United States* v. *California*, 337 U.S. 952.

[1] California's maps do not identify Point Hueneme, which is at Port Hueneme as shown on the map opposite page 94, or Newport Bay, which is the bay behind Newport Beach as shown on the maps opposite page 104.

California claimed that segments 1, 2, 3, and 7 were within an "overall unit area of inland water" extending from Point Loma to Point Conception and embracing all the islands south of Point Conception. Consequently, to determine the status of those segments, the Special Master had to consider the status of the whole "unit area," although it also included waters outside any of the listed segments.

By the Report of Special Master (under Order of December 3, 1951), dated October 14, 1952, and ordered filed November 10, 1952, 344 U.S. 872, the Special Master recommended:

> 1. That territorial waters should be measured from the shore along the mainland and around each island, and that the intervening waters were not inland waters (pp. 2–3);
>
> 2. That none of the seven segments was a bay constituting inland waters (p. 3);
>
> 3. That the seaward limits of inland waters should be drawn as follows:
>
> (a) For bays, between the headlands or at the point nearest to them where the opening did not exceed 10 nautical miles in width, provided that the area so enclosed was comparable (by the modified technique known as the "Boggs formula" and described in detail *infra,* pp. 67–68) to the area of a semicircle drawn on the closing line (pp. 3–4);
>
> (b) For ports and harbors, "to embrace an anchorage reasonably related to the physical surroundings and the service requirements of the port," *prima facie* the line of outermost permanent harbor works (p. 4);

(c) For rivers, across the mouth in the general direction of the coast, whatever the width; or where rivers flowed into estuaries, the estuaries should be treated as bays (p. 4);

(d) That the closing line should be drawn to the ordinary low water mark on the outermost extension of the natural headland, if any; or in the absence of pronounced headlands, to the ordinary low water mark on the shore where it was intersected by a line drawn to bisect the angle formed by lines extending the general trend of the ordinary low water mark on the shores of the open coast and of the tributary waterway (p. 4);

4. That the "ordinary low-water mark on the coast of California" is the intersection of the shore (as it exists at the time of survey) with the plane of the mean of all low waters as established by the United States Coast and Geodetic Survey from observations over a period of 18.6 years (pp. 4–5).

The Special Master pointed out (Report, p. 6) that the parties agreed that the method of delimiting inland waters would also determine the exterior limit of the marginal belt and so involved the territorial jurisdiction of the United States—a question of external sovereignty. In view of this, he adopted the method of delimiting inland waters which, as the United States asserted and the Special Master found, was in fact followed by the United States in its international relations (Report, pp. 6–29). The Special Master accepted the "Boggs formula," not as a definitive part of United States policy, but as an appropriate technique, approved as such by the State Department, for determining whether a bay was suffi-

ciently "landlocked" to be inland waters (Report, pp. 25–26). The Special Master recognized that waters not complying with the stated geometric criteria could still acquire the status of inland waters if historically subjected to domestic jurisdiction as such; but finding that neither the United States nor California had exercised such jurisdiction over the disputed areas, he declined to decide whether action by the State alone could suffice to produce that result (Report, pp. 30–39).

The tide on the California coast is of the mixed type, that is, there are two high and two low tides, of unequal height, daily. The Special Master concluded that the ordinary low water mark should be taken as the mean of all low waters, rather than mean lower low water as urged by California (Report, pp. 39–43). He accepted the agreement of the parties that the ordinary low water line was subject to continuing change by gradual, natural processes, including accretion brought about by artificial structures (Report, p. 44), and held that the boundary line should also include artificial changes in the shore and artificial harbor works (Report pp. 44–48).

Both parties filed exceptions to that Report in January 1953.

By the Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C. 1301–1315 (Appendix "A," *infra*, pp. 1a–5a), the United States ceded to California the submerged lands within the State boundary, subject to the limitation that in no event should the area granted extend into the Pacific Ocean more than three geographical miles from the line of ordinary

low water and the outer limit of inland waters. Sec. 2 (b) and (c), 43 U.S.C. 1301 (b) and (c). The United States concedes that California received the maximum amount permitted under that limitation.

The area thereby granted to the State is defined identically with the area awarded to the United States by the decree of October 27, 1947, herein (Appendix "A," *infra,* p. 1(a); that is, the submerged land extending three geographical miles seaward from the ordinary low-water line and from the outer limit of inland waters. The grant thus appeared on its face to terminate the effect of the decree and so to render moot the supplemental proceedings to give the decree greater precision. In fact, however, the result was merely to shift three miles seaward the limits of the submerged area claimed by both parties. The same dispute remains as to the proper location of the ordinary low-water line and outer limits of inland waters, which formed the old dividing line and from which the new dividing line (three miles seaward) must be measured. Because of disagreement as to what areas constitute inland waters, the area now claimed by both parties largely coincides with the area formerly contested. (See map opposite page 4 in the Memorandum for the United States (1) In Reply to Opposition to Motion for Leave to File Supplemental Complaint, etc.; filed September 4, 1963.) Feeling that this persistence of the same legal and factual issues made it desirable to go forward on the basis of the proceedings already had before the Special Master, rather than to duplicate them in a new case, the United States moved on

733-890—64——3

March 14, 1963, for leave to file a supplemental complaint, redescribing the issues as modified by the Submerged Lands Act.

On December 2, 1963, the Court allowed the supplemental complaint to be filed, directed California to answer, permitted both parties to file new exceptions to the Special Master's report if they wished to do so, and called for briefs in support of the exceptions. 375 U.S. 927. California has now answered the supplemental complaint, and both parties have filed new exceptions, wholly replacing their original exceptions to the Special Master's Report.

The present proceeding is on those exceptions. In our view, the appropriate procedure will be for the Court, after considering the exceptions, to approve the Report of the Special Master, with such modifications as the exceptions may require. This will establish principles which will, we believe, suffice to guide the precise identification of the line of ordinary low water and of the outer limit of inland waters, on which the decision of the controversy depends.[2] The parties should then be able to agree upon the exact

[2] California complains (Brief, p. 37, n. 18), in the course of its argument that the Special Master's Report should be rejected and new hearing proceedings convened, that it has not had an opportunity to prove its claims to the waters of Pelican Bay, Drake's Bay, and Bodega Bay, as inland waters. We believe that the principles for determining the outer limits of inland waters which were recognized by the Special Master and which are now before this Court are sufficient to determine the status of these bays. If the principles are sufficient, California will have had its opportunity in these proceedings to establish its claims. If these bays present questions not covered by these principles, then, of course, California may obtain further proceedings in which to litigate these questions.

line resulting from application of those principles and could then jointly propose a decree embodying the results of that agreement, or if some points of disagreement should still arise, they could return to the Court for settlement of those issues. In this way it should be possible to avoid burdening the Court unnecessarily with the purely technical aspects of applying legal principles to particular coastal configurations.[3]

SUMMARY OF ARGUMENT

I

The Submerged Lands Act has not diminished the controlling significance in this case of the questions considered by the Special Master. Although historic boundaries do provide one alternative measure of the grant made to the States by that Act, the grant was made subject to the absolute limit that in no event should it extend into the Pacific Ocean more than three geographical miles from the line of ordinary low water or from the outer limit of inland waters. Since the United States concedes that California is entitled to that much, the controlling questions in this case are the very questions considered by the Special Master, namely, the proper method of determining the line of ordinary low water and the outer limit of inland waters. Under the Act, as before, the State's historic boundary has no importance except to the extent, if any, that it bears on the question of what

[3] Our preliminary study suggests that a detailed description of the line between State and federal submerged lands would involve specification of approximately 1000 points that would control the location of the line.

are inland waters; the Act has given it no new significance.

The Submerged Lands Act made a present grant, measured by the low-water line and limit of inland waters as they were on the date of the Act (May 22, 1953). They were the same on that date as they were in October 1952, as found by the Special Master. The statutory grant also includes subsequent gradual, natural changes in the low-water line, as such changes, in legal contemplation, affect only its location and not its identity. However, subsequent artificial changes, or changes in the legal principles defining inland waters, establish new lines that cannot modify the extent of the area granted by the Submerged Lands Act.

II

Inland waters are, by definition, those waters over which a nation asserts exclusive sovereignty, as distinguished from the territorial sea ("marginal sea" or "three-mile belt") in which foreign vessels have a right of innocent passage under international law. The cognate questions of what foreign waters will be recognized, and what domestic waters will be claimed, as inland waters, involve international relationships and must be answered by the political branches of the national government to which matters of foreign relations are exclusively entrusted. The extent of the claim so made determines the limits of the inland waters of the United States, and is subject to judicial notice. The unquestionable source of judicial knowledge on this subject is an official statement by the Department of State; such a statement is not mere

evidence of the national policy but is the actual embodiment of it.

In 1951 the State Department declared the established position of the United States to be that a bay was recognized as inland waters only to the extent that it could be enclosed by a line not over 10 geographical miles long across the entrance, and only if it were more than a slight indentation of the coast; that estuaries and straits leading only to inland waters were treated as bays; but that elsewhere—on straight or slightly curved coasts, around islands, and within straits between areas of high seas—territorial waters began at, and were measured from, the low-water line.[4] The State Department referred to a proposal made by the United States in 1930 that an appropriate standard for the necessary degree of indentation of a bay was comparison of its area (with a technical modification called the "Boggs formula") with a semicircular indentation having an equal entrance. The 1958 Convention on the Territorial Sea and the Contiguous Zone adopts direct comparison with a semicircle as the standard, and we now suggest that as an equally appropriate test in this case. The State Department added that these rules were inapplicable where a nation could prove by historic usage that waters had been subjected to its exclusive authority.

[4] Other principles, not here contested, were that a river flowing directly into the sea was inland water, whatever its width; and that the marginal sea should be measured from the low-water line on elevations exposed only at low tide, if they were situated within the marginal sea as measured from the mainland.

In 1952 the State Department reiterated its adherence to these principles for defining the inland waters of the United States, even though on December 18, 1951, the International Court of Justice had held in the *Fisheries Case* that international law did not impose a 10-mile limit on bays, and did in some circumstances permit a nation to claim, as inland waters, areas enclosed by straight lines between coastal promontories or to and between offshore islands.

These statements by the State Department should be considered conclusive of the policy of the United States; but in any event, they are fully corroborated by history. California has not shown that the United States departed from them. Where United States policy was stated in more general terms, it was done in circumstances that made greater particularity inappropriate, and did not indicate an absence of precise rules. Particular bodies of water pointed to by California as inconsistent with these principles either were not recognized by the United States as inland waters, or were not recognized to the distance suggested by California, or were recognized on historic grounds.

The areas claimed by California as inland waters do not qualify as such under the principles followed by the United States in the conduct of its foreign relations. Nor does any other legal principle sustain the State's claims. The more liberal 24-mile maximum for entrances to inland waters, adopted as the policy of the United States upon ratification of the Convention on the Territorial Sea and the Contiguous Zone

in 1961, is not available to California, whose rights here depend on the grant made to it by the Submerged Lands Act in 1953. Even the 24-mile rule would not support California's claims, except at Monterey Bay. Straight baselines must be promulgated by the coastal nation; since the United States has drawn none, California's claim to the waters which would be enclosed must be rejected.

The State's effort to establish historic title to the disputed areas is equally unavailing. An historic title depends on showing a continuous effective exercise of sovereignty by the coastal nation, commensurate with its claim. The United States has not exercised exclusive sovereignty in the areas claimed by California as inland waters. States of the United States are not competent to participate in the making of policy in matters of international relations; consequently an exercise of sovereignty by California alone could not create historic inland waters, at least in the absence of adoption by the policy-making branches of the national government. Moreover, California legislation and administrative practice negative the claims now asserted; and such jurisdiction as California has exercised in the disputed areas, and judicial decisions relating to those areas, would show, at most, a claim that they were territorial waters. This could never sustain an historic claim that they were inland waters.

Both the Court's decree of 1947 in this case, and the Submerged Lands Act, define the rights of the parties by reference to the line of "ordinary" low water along the shore in touch with the open sea. This should be understood as designating the mean of

report was directed, were as follows (342 U.S. 891; Report, pp. 1–2):

> *Question 1.*—What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?
>
> *Question 2.*—Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers, and other inland waters to be drawn?
>
> *Question 3.*—By what criteria is the ordinary low water mark on the coast of California to be ascertained?

The Submerged Lands Act gave to the States "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States," sec. 3(a), 67 Stat. 30, 43 U.S.C. 1311(a), subject to the limitation that "in no event shall the term 'boundaries' or the term 'lands beneath navigable waters' be interpreted as extending from the coast line more than three geographical miles into * * * the Pacific Ocean," sec. 2(b), 67 Stat. 29, 43 U.S.C. 1301(b). It defined "coast line" as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;" sec. 2(c), 67 Stat. 29, 43 U.S.C. 1301(c).

Thus, the lands confirmed to the United States by the decree, the answers to the questions submitted to

the Special Master and the lands granted to the States by the Submerged Lands Act depend in each case upon the location of the same two critical elements: the ordinary low-water line and the outer limit of inland waters. The history of the Submerged Lands Act makes it clear that the Act used these terms in the same sense as did the decree and the order,[7] and explains why that was the case.

It is true, as California says (Brief, 24–27), that the Submerged Lands Act merely apportioned between the State and national governments the proprietary rights in the seabed; that this is purely a domestic matter; and that the dividing line could have been drawn quite independently of the criteria used by the Court in its decree herein. However, Congress did not choose to proceed in that fashion. Instead it used the same baseline that the Court had used in its decree. Consequently, the proceedings before the Special Master aimed at locating the baseline used by the Court are equally pertinent in locating the baseline used by the Act.

This identity of lands which were confirmed to the United States by the decree and conveyed to the States by the Act is no coincidence. The very purpose of the Act was to give the States the submerged lands that were denied to them by the decree.[8] Senator Holland, author of the Act, so explained its purpose (Hearings on S.J. Res. 13, Senate Committee on In-

[7] Two minor qualifications of this are discussed *infra*, pp. 26–30.

[8] As a precaution, the Act also reaffirmed State titles to tidelands (the area between the lines of high and low tide) and

terior and Insular Affairs, 83d Cong., 1st Sess., p. 32):

> This joint resolution will confirm to the maritime States—of which there are 20—the rights which they had respectively enjoyed since the founding of our Nation and up to the date of the decision in the California case, in their offshore lands and waters which lie within their constitutional boundaries. * * *

The committee report gives a similar explanation (S. Rep. No. 133, 83d Cong., 1st Sess. (Cong. Doc. Ser. No. 11659), p. 6). Senator Cordon, in charge of the bill, explained it to the Senate (99 Cong. Rec. 2618–2619):[9]

> In short, Mr. President, the purpose of the joint resolution is to create by law a status and condition which existed, in fact, up to the time of the California decision. What had been done was done under a belief that the law was as the law will be if Senate Joint Resolution 13 is adopted. * * *

Even more pointed evidence that the Act was designed to convey the same lands that were the subject matter of the decree is found in connection with the term "inland waters" in the definition of "coast line," sec. 2(c), 67 Stat. 29, 43 U.S.C. 1301(c). As originally introduced, that definition had included at the

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lands under inland navigable waters, which the United States had not claimed. See 99 Cong. Rec. 2693, 2750. That aspect of the Act is not involved here.

[9] Additional materials showing that the purpose of the Submerged Lands Act was to give to the States the same area that was denied them by the decrees in this and related cases are set out in California's Brief, Vol. II, Appendix, pp. 2–11.

end, following the words "inland waters," the phrase, "which include all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea." S. Rep. No. 133, 83d Cong., 1st Sess. (Cong. Doc. Ser. No. 11659), p. 14. That phrase was deleted by the Senate Committee "because of the committee's belief that the question of what constitutes inland waters should be left where Congress finds it." *Id.*, p. 18. Senator Cordon repeated that explanation on the floor of the Senate. 99 Cong. Rec. 2633.

Senator Holland told the Senate, "The joint resolution simply continues the outer boundary of inland waters pursuant to the decisions of the Supreme Court already made." 99 Cong. Rec. 2756. That statement was made in the course of a discussion of the precise question of whether the joint resolution would enable California to claim a coast line drawn out around all the islands (*ibid.*):

> Mr. DOUGLAS. * * * But I believe also there was a question [before the Special Master in this case] as to whether the 3 miles should be measured from the continental land mass or from a line connecting the outer shoreline of the chain of islands lying off the coast of southern California.
>
> Mr. HOLLAND. Under the joint resolution, no such contention could be maintained.
>
> Mr. DOUGLAS. Is the Senator certain of that?
>
> Mr. HOLLAND. That is what I believe, and that is what every legal authority I have consulted on the subject believes. Incidentally, the only reason why there was some thought to the contrary was some wording in the original joint

> resolution, which has been omitted, which would have made the outer boundary of inland waters farther out than that which is now provided by the joint resolution. The joint resolution simply continues the outer boundary of inland waters pursuant to the decisions of the Supreme Court already made. In the case of California I think the record should also show that very deep waters exist off the shore of the mainland of California, so, in my opinion, it would certainly be completely illogical to make a claim that the State boundaries embraced those deep waters and channels. I do not believe any such claim could possibly be substantiated under existing law, much less under the joint resolution, if it should be passed.

In response to a question by Senator Kuchel of California, Senator Holland conceded that the resolution would leave it open to California to claim that it had had such a boundary from the time of its admission;[10] but he went on to repeat that no such claim could come within the meaning of "inland waters" (99 Cong. Rec. 2757):

> The Senator from Florida believes that the laws, as announced over and over and over again by the Supreme Court, as to the delimitation of inland waters, are sufficiently fixed, definite, and certain so that it would require

[10] At the time of this colloquy, the bill contained no limit on the area granted to a State within its "historic boundaries." Later the measure was amended to provide that in no event should the area granted extend into the Atlantic or Pacific more than three miles from the coast line. "Historic boundaries" were thereby deprived of significance except in the Gulf of Mexico or insofar as they delimited historic *inland* waters. See *infra*, pp. 23–26.

> a complete, cataclysmic change of the Supreme Court's philosophy in that field to afford any hope for an extension of the boundaries of the good State of California so that they would go out beyond the islands as to all areas contained within an outer line. * * *

There could hardly be a more conclusive indication than this statement by the author of the measure, that it referred to the same "inland waters" as were referred to by to the Court's decree in this case.

B. THE SUBMERGED LANDS ACT HAS GIVEN NO NEW SIGNIFICANCE TO CALIFORNIA'S CLAIM OF AN "HISTORIC BOUNDARY"

In an attempt to show that the Submerged Lands Act has introduced a new element into the case which renders the Special Master's Report obsolete, California argues that the Act has given the State the submerged lands within the State's "historic boundary," and that consequently the Special Master's Report must be rejected as a basis for deciding the present controversy because it gave no effect to California's historic claims. Brief, 27–35. California then argues that its historic boundary included all waters between offshore islands and the mainland, and all coastal indentations that were commonly called "bays" in 1849. Brief, 35–65.

The contention rests on a mistaken premise. The Submerged Lands Act imposes, as an absolute limit on the area granted to the State, the restriction that in no event can it extend into the Pacific Ocean more than three geographical miles from the ordinary

low-water line or from the outer limit of inland waters. The United States concedes that the grant to California does extend that far. Since under the Act it cannot extend farther, the controlling question is still the location of the coast line, *i.e.* the ordinary low-water line and the outer limit of inland waters, just as it was before the Special Master. Questions as to California's historic boundary have no new signifiance because of the Act.

The terms of the Submerged Lands Act leave no room to doubt that it imposed this maximum limit on the area given to California. The granting section of the Act, Section 3, provides (67 Stat. 30, 43 U.S.C. 1311(a)):

> title to and ownership of the lands beneath navigable waters within the boundaries of the respective States * * * are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States * * *.

The extent of that grant depends on the meaning of the terms "lands beneath navigable waters" and "boundaries," both of which are limited by Section 2 as follows (67 Stat. 29, 43 U.S.C. 1301):

> (b) * * * but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;
>
> (c) The term "coast line" means the line of ordinary low water along that portion of the

> coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters; * * *.

The history of the limiting phrase in Section 2(b), quoted above, makes clear that its precise purpose was to prevent the assertion of more extended claims based on historic grounds. As reported to the Senate, the bill did not include such a limitation. S. Rep. No. 133, 83d Cong., 1st Sess., p. 2 (Cong. Doc. Ser. No. 11659). Various Senators expressed fear that reference in Section 2 to historic boundaries would open the way to claims of unforeseeable extent. *E.g.*, 99 Cong. Rec. 2917, 2975–2977, 3040, 3273, 3336–3337, 3381, 3549, 3552–3553, 3655, 3885–3886, 4085. To allay those fears, Senator Holland proposed adding the limitation quoted above. 99 Cong. Rec. 4114. He said that its words were "words of limitation, not words of grant or release" (99 Cong. Rec. 4115), and that its purpose was "to have the language more clearly spelled out than it was in the original measure, to the effect that there is no intention whatsoever to grant boundaries beyond 3 geographical miles in either the Atlantic or the Pacific * * *" (99 Cong. Rec. 4116). The amendment was adopted without opposition. 99 Cong. Rec. 4116.

As we have said, the United States concedes that the Submerged Lands Act gave California the submerged lands extending seaward to a distance of three geographical miles from the ordinary low-water line and from the outer limit of inland waters.[11] The

[11] See California Brief, p. 65, n. 27.

Act expressly denies California anything more. Therefore, so far as the Act is concerned, questions of California's historic boundary are immaterial.

This is not to say that some of the historical events might not have relevance to the identification of the coast line. That would be true, for example, if the evidence were to show that a bay not otherwise qualified as inland waters constituted historic inland waters from the standpoint of international law. We discuss the events in that connection. Point II, *infra*, pp. 160–178. It is clear, however, that such events have no different relevance today than they had when the issues were beforethe Special Master. Here again, the Submerged Lands Act has not altered the controlling issues.

C. THE FACT THAT THE SUBMERGED LANDS ACT ESTABLISHES A NEW DATE FOR DETERMINATION OF THE LOCATION OF THE COAST LINE DOES NOT MAKE THE SPECIAL MASTER'S REPORT OBSOLETE

We should acknowledge that in one minor respect the critical issues before the Special Master concerning the location of the coast line were theoretically different from the issues under the Submerged Lands Act. At the time of those proceedings the coast line, in the view of the Special Master, was to be fixed as of the date of the Court's decree, October 27, 1947, Report, p. 22. The Submerged Lands Act, on the other hand, is a grant *in praesenti* to California of the submerged lands within three miles of its "coast line" and must be understood to refer to the coast line that existed on the date of the Act, May 22, 1953. As

Senator Cordon said (Hearings on S.J. Res. 13, Senate Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., Pt. 2, p. 1354): [12]

> Those who prepared the bill over the years took the view—and that is the way the bill is before us—that "coastline" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters. That is in the present tense. *It is the coastline as of now. We have confirmed here 3 miles from the coastline as of now.* * * * [Emphasis added.]

The Senate itself acted decisively to establish this point. Sections 2(a)(2), 2(b), and 4 of the Submerged Lands Act, as reported by the committee, would have given effect to State boundaries as "heretofore or hereafter" approved by Congress. S. Rep. No. 133, 83d Cong., 1st Sess. (Cong. Doc. Ser. No. 11659), pp. 2, 4. The Senate by amendment deleted the words "or hereafter" in each case. 99 Cong. Rec. 4114–4116.

The difference in the dates of measurement, however, is immaterial insofar as the relevance of the report is concerned. In the proceedings before the Special Master, the parties agreed that the coast line included modifications that might occur from time to time by gradual, natural processes such as accretion and reliction and the Special Master accepted that

[12] A more extended quotation of Senator Cordon's statement is set forth at Calif. Appendix, pp. 21–24.

view. Report, p. 44.[13] We agree with California that the same is true under the Submerged Lands Act. Brief, 65–67.[14] The history of the Act confirms that Congress intended the statute to adhere to this established principle.[15] See, *e.g.*, 99 Cong. Rec. 2630, 2697.

We know of no changes in the legal definition of the coast line between the date of the decree—when the Special Master fixed the boundary—and May 22, 1953. If there were artificial changes between 1947 and 1953, they will, of course, be taken into account in drawing the specific point-to-point baseline along the coast in accordance with the principles to be enunciated by the Court. Thus, the report itself is just as useful to the Court now as it was before, as a basis

[13] The common law has always treated water line boundaries as ambulatory insofar as changes are gradual and natural. *Jones* v. *Johnston*, 18 How. 150, 155; *Stevens* v. *Arnold*, 262 U.S. 266, 270; *Jefferis* v. *East Omaha Land Co.*, 134 U.S. 178, 189; *Barney* v. *Keokuk*, 94 U.S. 324, 337–338; *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 66; *Banks* v. *Ogden*, 2 Wall. 57, 67; *New Orleans* v. *United States*, 10 Pet. 662, 717.

[14] California speaks both of the coast line as it "currently" exists and of the line of ordinary low water "as it is now located." Brief, 67. If this is meant to exclude future natural, gradual changes, we would disagree. However, from the tenor of California's discussion, we construe this as referring to the shore as it may exist from time to time.

[15] The Special Master accepted the parties' agreement that gradual changes through the action of the water, even if brought about by artificial means, should be considered for this purpose to be "natural" changes, in accordance with the federal rule, *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 66–69, rather than "artificial" as under the California rule, *People* v. *Hecker*, 179 Cal. App. 2d 823, 4 Cal. Reptr. 334. Report, p. 44. We believe that the Submerged Lands Act likewise adopted the federal rule in this respect, and California apparently agrees. Brief, p. 67.

for considering how California's coast line, as defined in the Submerged Lands Act, should be demarcated for the purpose of identifying the submerged lands owned by the State.

Indeed, the enactment of the Submerged Lands Act in essence restricts the scope of exceptions which the United States had taken to the Special Master's conclusion that, with respect to artificial changes in the shore and changes in the law, the boundary was to be fixed as of 1947. We took the position there that California's rights in submerged lands were to be measured by the coast line that existed when California entered the Union in 1850, including artificial works then in existence. However, we asserted that artificial changes subsequent to 1850 were of no effect so far as California's proprietary rights were concerned.[16] As our Brief in Support of Amended Exceptions to the Special Master's Report (filed April 1, 1964), pp. 22–26, makes clear, we now concede that the Submerged Lands Act, by making a grant measured from the coast line in existence on the date of the Act, has given the State the benefit of artificial works in existence at that time.

The same situation applies to changes in the legal definition of the coast line for international purposes, occurring after May 22, 1953. Before the Special Master, where California's rights depended on the application of recognized legal principles, we argued that established legal practice required the supple-

[16] The basis for that position is set out in our Brief in Support of Amended Exceptions to the Special Master's Report (filed April 1, 1964), pp. 16–22.

Next, we show that the Special Master correctly applied the foregoing principles in holding that each of the seven disputed areas is outside of inland waters. See pp. 141–144, *infra*.

We then turn to the alternative principles advanced by California and, taking up each seriatim, show that her theories not only are unsound but, even if sound, would sustain only her claim to Monterey Bay. See pp. 145–178, *infra*.

Finally, we turn to the rule for ascertaining the coast line in areas where the shore meets the open sea. We show that the Special Master correctly ruled that the dividing line between State and federal rights where the shore meets the open sea is the line of the mean of all low waters and that the Submerged Lands Act adopted this line as the baseline from which to measure the three-mile belt of submerged land given to the States. See pp. 178–182, *infra*.

A. THE SPECIAL MASTER CORRECTLY STATED AND APPLIED THE RULES GOVERNING THE DELIMITATION OF "INLAND WATERS" FOR THE PURPOSES OF THE PRESENT CASE.

1. THE CASE IS CONTROLLED BY THE RULES FOLLOWED BY THE UNITED STATES ON MAY 22, 1953, IN DELINEATING THE INLAND WATERS OF THE UNITED STATES FOR THE PURPOSES OF INTERNATIONAL RELATIONS.

California's first exception to the Special Master's Report is (Calif. Exceptions, p. 3)—

> to the Special Master's basic assumption * * * with which California formerly agreed * * * that the determination of the demarcation line at which inland waters end and the marginal sea begins "involves a question of the terri-

> torial jurisdiction of the United States as against foreign nations, i.e., a question of external sovereignty."

It is not clear to us whether California means that the Special Master was wrong in 1952 in treating the question as one of external sovereignty, or that such treatment of the question has been rendered inappropriate by the Submerged Lands Act. However, it is our understanding that California takes the latter position (see Calif. Brief, p. 68) and we have answered the contention in Part I (*supra*, pp. 16–30).

It is equally plain that the Special Master was correct in treating the questions submitted to him as being essentially controlled by the principles applicable to the foreign relations of the United States. Our original complaint described the property in controversy as "the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of the State, extending seaward three nautical miles * * *." Complaint, paragraph II, pp. 6–7. In the Brief for the United States in Support of Motion for Judgment (filed January 17, 1947), pp. 17–18, we explained that we were using the term "inland waters" in the international law sense of those waters whose outer limit forms part of the baseline of the marginal sea. The whole rationale of this Court's opinion, 332 U.S. 19, is that the Court was determining rights in the marginal sea on the basis of the history and status in international law of the marginal sea as distinguished from inland waters. See particularly 332 U.S. at 25–

26 and 30–37. The decree awarding the United States the submerged lands seaward of the outer limit of "inland waters" (332 U.S. 804, 805, Appendix "A", *infra,* p. 1a) obviously used "inland waters" in the same international law sense. If it had used the term in some other, undefined and undisclosed sense, it would have said nothing more than that State ownership ends at the outer limit of those waters under which the State owns the submerged lands. Certainly the Court intended nothing so fatuous.[18]

As we have previously shown (*supra,* pp. 18–23), Congress deliberately chose to measure the grant made by the Submerged Lands Act from the same baseline as was used by this Court in its decrees in this and related cases, *i.e.* from the line between inland waters and the territorial sea. Consequently, the problem is now, as it was before the Special Master, to identify the waters that would have been considered inland waters in relations between the United States and foreign nations.

There is no merit in California's assertion (Brief, 50–58, 68–85) that the United States did not have an established policy regarding the method of delimiting its inland waters and marginal sea. On the contrary, it did have such a policy and the Special Master correctly accepted that policy as the basis for his answers to the questions submitted to him. Neither is Cali-

[18] California itself, in its Brief in Relation to Report of Special Master of May 22, 1951 (filed July 31, 1951), pp. 7–13, explained at much greater length why the "inland waters" referred to in the decree must be understood as being those having such status in international relations.

fornia correct in arguing (Brief, 69–70) that this controversy must now be controlled instead by the principles later embodied in the Convention on the Territorial Sea and the Contiguous Zone. It is true that the Convention defines the present policy of the United States on this subject,[19] but it did not define the policy in 1952 when the Special Master made his report, or in 1953 when Congress passed the Submerged Lands Act. The Convention, and particularly discussions leading up to its adoption, may be helpful in shedding light on the prior international law and position of the United States; but innovations made by the Convention in 1961 [20] do not increase or decrease the extent of the submerged land that Congress gave to California in 1953. As we have shown (*supra*, pp. 26–27), the Submerged Lands Act made a grant *in praesenti*, the extent of which was defined by reference

[19] The Convention, U.N. Doc. A/CONF.13/L.52, 106 Cong. Rec. 11174–11177, was executed April 29, 1958, 106 Cong. Rec. 11176, was approved by the Senate May 26, 1960, 106 Cong. Rec. 11196, and was ratified by the President March 24, 1961, 44 State Dept. Bull. 609. Writing to Attorney General Kennedy on January 15, 1963, Secretary of State Rusk said of the Convention (2 International Legal Materials 527, 528):

"Although the Convention is not yet in force according to its terms because twenty-two States have not yet ratified or acceded to it, nevertheless, it must be regarded in view of its adoption by a large majority of the States of the world as the best evidence of international law on the subject at the present time. * * * Furthermore, in view of the ratification of the Convention by the President with the advice and consent of the Senate, it must be regarded as having the approval of this Government and as expressive of its present policy. * * *"

[20] Changes made by this Convention are discussed *infra*, pp. 146–149.

to the then applicable definition of "inland waters," which was the same as under the law of 1952 when the Special Master made his report. The Convention has not impaired either the correctness or the present applicability of the Special Master's conclusions.

2. THE DETERMINATIONS OF THE EXECUTIVE BRANCH CONCERNING THE PRINCIPLES TO BE FOLLOWED IN DELIMITING THE INLAND WATERS OF THE UNITED STATES FOR PURPOSES OF INTERNATIONAL RELATIONS ARE BINDING IN DOMESTIC JUDICIAL PROCEEDINGS

a. ***The inland waters of the United States cannot extend beyond the inland waters claimed by the United States in the conduct of international relations***

We need not consider here the question whether there may be water areas so small and so landlocked that international law would *require* a nation to exercise exclusive jurisdiction over them [21] (where, for example, a neutral nation would have an inescapable duty to prevent belligerent acts by third powers). The water areas under discussion would never fall in any such class. The most that California has asserted or could assert is that these areas are of such character that international law would *permit* them to be claimed as inland waters. But obviously,

[21] Such, apparently, is the intent of Article 8 of the Convention on the Territorial Sea and the Contiguous Zone, 106 Cong. Rec. 11174, which provides that the outermost permanent harbor works "shall be regarded" as forming part of the coast. A Norwegian proposal to substitute "may be regarded," to make the provision permissive rather than mandatory, was rejected by the conference committee that prepared the convention. *United Nations Conference on the Law of the Sea: Official Records*, Vol. III: First Committee (Territorial Sea and Contiguous Zone) Summary Records of Meetings and Annexes (U.N. Doc. A/CONF. 13/39), 141–142, 239.

within the permissible limits of choice, the choice must rest with the coastal nation. Such a decision, involving matters of national and international policy, cannot be made for it by anyone else. As the International Court of Justice said in the *Fisheries Case* (*United Kingdom* v. *Norway*), I.C.J. Reports 1951, p. 116, 132, "the act of delimitation is necessarily a unilateral act, because only the coastal State [22] is competent to undertake it * * *."

As to straight baselines, this optional aspect is expressed by the provision of Article 4 of the Convention on the Territorial Sea and the Contiguous Zone, 106 Cong. Rec. 11174, that in described circumstances the method of straight baselines "may" be employed; and it was emphasized in the State Department memorandum of March 2, 1960, answering certain questions by the Senate Committee on Foreign Relations regarding that and the other conventions on the law of the sea: "In the first place it should be pointed out that the use of the straight baseline method * * * is permissive. The rule does not operate automatically * * *." Hearing, S. Committee on Foreign Relations, Conventions on the Law of the Sea, Executives J, K, L, M, N, 86th Cong., 2d Sess., 82, 84.

The extent to which bays and gulfs will be claimed as inland waters likewise depends on an affirmative policy decision by the coastal nation. This also was pointed out in the *Fisheries Case, supra,* I.C.J. Reports 1951, at p. 131, where the court said that

[22] *I.e.*, nation. See, *infra*, pp. 163–164.

"although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit." This was clearly brought out by the State Department letter of February 12, 1952, Appendix "A", *infra*, pp. 11a, 13a, which said:

> It is true that some of the principles on which this United States position has been traditionally predicated have been deemed by the [International] Court not to have acquired the authority of a general rule of international law. Among these are * * * the principle that in the case of bays no more than 10 miles wide, the base line is a straight line across their opening. These principles, however, are not in conflict with the criteria set forth in the decision of the International Court of Justice. The decision, moreover, leaves the choice of the method of delimitation applicable under such criteria to the national state. The Department, accordingly, adheres to its statement of the position of the United States with respect to delimitation of its territorial waters in date of November 13, 1951.

The case of *The Fagernes*, L.R. (1927) P. 311 (C.A.), was a specific application of the principle that British jurisdiction over bays (there, a point in the Bristol Channel) did not extend farther than the British Government claimed that it did.

b. ***The principles established by the policy and practice of the Executive Branch for fixing the inland waters of the United States are binding in domestic judicial proceedings***

This Court has always insisted that American courts "should not so act as to embarrass the executive arm in its conduct of foreign affairs." *Republic of Mexico* v. *Hoffman,* 324 U.S. 30, 35; *Ex parte Peru,* 318 U.S. 578, 588. A decision in the field of foreign policy is "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines* v. *Waterman Corp.,* 333 U.S. 103, 111. This means, of course, that a court will not make an independent decision on a political question; it does not prevent a court from discovering what decision has been made by the political branches, and giving it appropriate application in deciding a justiciable case. "Recognizing that the determination of sovereignty over an area is for the legislative and executive departments * * * does not debar courts from examining the status resulting from prior action." *Vermilya-Brown Co.* v. *Connell,* 335 U.S. 377, 380.[23]

The definition of the territory over which the United States has sovereignty is a political question to which this principle applies. In *Vermilya-Brown Co.* v. *Connell, supra,* the question was whether the United States had acquired sovereignty over military bases leased from the British government in Bermuda.

[23] California has expressly abandoned its former contention that the questions involved are not justiciable. Calif. Exceptions, p. 2.

The State Department had determined that the arrangement did not give the United States sovereignty over the bases, and the Court said (335 U.S. at 380–381):

> In the light of the statement of the Department of State, we predicate our views on the issue presented upon the postulate that the leased area is under the sovereignty of Great Britain and that it is not territory of the United States in a political sense, that is, a part of its national domain.

Similarly, this Court held itself bound by an executive determination that the Isle of Pines was not territory of the United States, *Pearcy* v. *Stranahan,* 205 U.S. 257, and by an executive determination that the island of Navassa had been brought under the jurisdiction of the United States, *Jones* v. *United States,* 137 U.S. 202. To the same effect was *Foster* v. *Neilson,* 2 Pet. 253. The issue there was whether the Louisiana Purchase was bounded on the east by the Iberville River or extended east to the Perdido River. That depended, in turn, on whether the area between the two rivers was included in the retrocession of Louisiana from Spain to France by the Treaty of San Ildefonso. At issue was the validity of land grants made by Spain between 1803, the date of the Louisiana Purchase, and 1819, when the United States acquired Florida from Spain. Both Spain and France asserted that the area in question had not been retroceded to France by the Treaty of San Ildefonso; but the President and Congress took a different view,

and this Court held that it was bound to conform to their conclusion.

This principle, that the judiciary is bound by political determinations as to the territorial extent of national jurisdiction, was recognized and applied by the Court in the present case to the specific question of the extent of maritime jurisdiction. The Court said (332 U.S. at 33–34):

> That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. * * * And this assertion of national dominion over the three-mile belt is binding upon this Court.

To the same effect, see *In re Cooper,* 143 U.S. 472.

The location of the coast line is also necessarily a political question in the field of foreign relations, within the foregoing principle. It affects foreign relations because foreign vessels have a right of innocent passage in the marginal sea outside the coast line, but no such right in inland waters inside it. Further, it is one of the factors going to establish the seaward maritime boundary, the other factor being the width of the marginal belt between the coast line and the seaward boundary. As the International Court of Justice said in the *Fisheries Case* (*United Kingdom* v. *Norway,* I.C.J. Reports 1951, pp. 116, 132) with reference to the establishment of a baseline from which to measure the width of the marginal sea, "The delimitation of sea areas has always an international aspect * * *." At least in the absence of congressional action defining the nation's maritime limits,

it is necessarily the function of the Executive, who alone represents this nation in its relations with other nations, to decide what maritime claims this nation will assert or recognize in those relations.

It follows that the Special Master was correct in treating the question of the delimitation of inland waters as one to be answered by reference to the position taken on the subject by the executive branch of the government.

c. The principles established by the policy and practice of the Executive Branch for fixing the inland waters of the United States are subject to judicial notice

Throughout this litigation, the United States has taken the position that the maritime limits of the United States, and, accordingly the outer limits of inland waters (which are a direct function of the maritime limits), are subject to judicial notice. In *Jones* v. *United States,* 137 U.S. 202, 214, this Court said:

> All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer * * * as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings.

This principle is as applicable to the question of maritime limits as to the question of sovereignty over an island, involved in the *Jones* case. Thus, in the case of *The Fagernes,* L.R. (1927) P. 311 (C.A.), involving a collision between two vessels in the Bristol

Channel, the court held that it was bound to take judicial notice that the point of collision was not within the sovereign jurisdiction of the Crown. In the seriatim opinions, Atkin, L.J., said (p. 324), "What is the territory of the Crown is a matter of which the Court takes judicial notice," and Lawrence, L.J., said (pp. 329–330), that "It is the duty of the Court to take judicial cognizance of the extent of the King's territory * * *."

The fact that the Court may take judicial notice of the national maritime limits means that the Court may also take judicial notice of the outer limits of inland waters of the United States. The maritime limits are determined by measuring three miles seaward from the outer limits of inland waters. Thus, the outer limit of inland waters in every case bears a fixed relation to the national maritime limits; one is a function of the other. If the Court has judicial knowledge of one, it automatically has judicial knowledge of the other.

d. The declarations of the Department of State are a conclusive statement of the principles for fixing the inland waters of the United States

In accordance with this position, we presented to the Special Master two official statements of the State Department setting forth the policy and practice of the executive branch for fixing the inland waters of the United States. The first was a letter of November 13, 1951, from Acting Secretary of State James E. Webb to Attorney General J. Howard McGrath, describing in detail, with some historical documentation,

> instruct you then as a matter of law, that at the time of the alleged arrest, Mr. Brandis was a minister of Denmark in the character stated in the certificate. [Emphasis added.]

See also *United States* v. *Ortega,* 27 Fed. Cas. No. 15,971 (C.C.E.D. Pa.) and *United States* v. *Liddle,* 26 Fed. Cas. No. 15,598 (C.C.D. Pa.).

In the same way, the question whether a libeled vessel is the property of a foreign sovereign and so immune from suit will be conclusively determined by an official statement that the government so recognizes it. In *Ex parte Peru,* 318 U.S. 578, the Republic of Peru intervened in an admiralty proceeding to assert ownership of the libeled vessel, and sovereign immunity from suit. The Attorney General filed a certificate from the Department of State, recognizing the sovereign immunity of the ship. The Court said (p. 589):

> The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations. Upon the submission of this certification to the district court, it became the court's duty, in conformity to established principles, to release the vessel and to proceed no further in the cause.

See also *Compania Espanola* v. *Navemar,* 303 U.S. 68, 74; *Ex parte Muir,* 254 U.S. 522, 532–533; and cases there cited.

The same rule applies to questions of sovereignty or territorial jurisdiction. In *Vermilya-Brown Co.* v. *Connell, supra,* where the question was whether the United States had acquired sovereignty over military bases in Bermuda which it leased from the British government, the Legal Adviser of the State Department wrote to the Attorney General that the United States had not acquired sovereignty, and the Court accepted that statement.

The British cases are to the same effect. *The Fagernes,* L.R. (1927) P. 311 (C.A.); *Duff Development Co.* v. *Kelantan Government,* L.R. (1924) A.C. 797 (H.L.); *Mighell* v. *Sultan of Johore,* L.R. (1894) 1 Q.B. 149 (C.A.); *Engelke* v. *Musmann,* L.R. (1928) A.C. 433 (H.L.); *Foster v. Globe Venture Syndicate,* L.R. (1900) 1 Ch. 811, 813.[25]

The Special Master agreed that statements by the State Department should be accepted as conclusive of the contemporaneous practice of the United States (Report, p. 21), but he ruled that they were not necessarily conclusive as to its past practice (Report, pp. 21–22). Believing that the critical question before him was the practice of the United States at the time of entry of the decree of October 27, 1947, he rejected our contention that the State Department letters were conclusive, and admitted evidence offered by California to show that the practice of the United States had in fact been otherwise. Report, 9–23.

[25] These cases are discused at pp. 40–48 of the Brief for the United States before the Special Master.

We believe that the Special Master's ruling in this regard was wrong.[26] However, the error is no longer of any moment. The passage of the Submerged Lands Act has eliminated the issue, since the date of the Act, rather than the date of the decree, is now the date to which reference must be made (*supra,* pp. 26–27). The State Department letters of 1951 and 1952 are plainly conclusive as to the national policy on their respective dates; and in the absence of anything to show an affirmative change in the interval, that policy must be presumed to have continued until passage of the Submerged Lands Act on May 22, 1953. *Kennett* v. *Chambers,* 14 How. 38, 51.[27]

e. The declarations of the Department of State correctly set forth the principles historically followed by the Executive Branch in the conduct of international relations

While we believe that the Special Master was wrong in looking beyond the letters of the State

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[26] The United States has excepted to the Special Master's ruling. Amended Exceptions of the United States, Nos. 3, 5, pp. 2–3. Both reason and authority support the view that a statement by the executive branch is equally conclusive, whether it relates to a present or a past fact. In most cases, the operative facts will have occurred prior to the time when an executive statement is sought by the Court, so that the statement commonly will be directed, of necessity, to a past fact. Such was the case in *Ex parte Hitz*, 111 U.S. 766, where a statement secured from the State Department in 1884 was accepted as determinative of the diplomatic status of an individual at the time of the offense involved, which was no later than 1881 since the indictment was filed in that year. Accord, *United States* v. *Liddle*, 26 Fed. Cas. No. 15,598 (C.C. D. Pa).

[27] The fact that the United States is a party in the case does not diminish the conclusiveness of the State Department

Department to find the applicable policy of the United States, the error has no significance because there is no divergence between the applicable policy of the United States as set forth in the State Department letters and this nation's historical position. As we show in the next section, each principle applied in the report of the Special Master is confirmed by the historic practice of the United States, as well as by the Department's declarations.

3. THE DECLARATIONS OF THE DEPARTMENT OF STATE AND THE HISTORICAL EVIDENCE SHOW THAT THE REPORT OF THE SPECIAL MASTER CORRECTLY STATED THE PRINCIPLES FOLLOWED BY THE UNITED STATES IN DELIMITING INLAND WATERS FOR INTERNATIONAL PURPOSES

Throughout its history, the United States has made freedom of the seas a basic principle of its international policy. It has consistently sought to hold to a minimum the extent to which coastal nations sub-

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letters or require them to be rejected as self-serving. It would indeed be anomalous to suggest that a question that must be answered in all other litigation by reference to executive statements, must be answered differently in federal litigation, and that executive policies that must be respected in all other circumstances are subject to being thwarted by judicial re-evaluation in the very cases where the United States will be bound by the judgment. The United States has in fact been a party in many cases where executive statements have been held conclusive. *E.g.*, *Jones* v. *United States*, 137 U.S. 202; *United States* v. *Benner*, 24 Fed. Cas. No. 14,568 (C.C. E.D. Pa.); *United States* v. *Ortega*, 27 Fed. Cas. No. 15,971 (C.C. E.D. Pa.); *United States* v. *Liddle*, 26 Fed. Cas. No. 15,598 (C.C. D. Pa.).

ject bordering waters to their own jurisdiction, either as inland waters or as territorial sea. This policy requires the United States, for its part, to exercise great restraint in claiming inland waters and territorial sea, especially where a choice is open under international law. It springs from the conviction that the commercial and defense interests of the nation are best served by maintaining an international order in which the greatest possible areas of the world's oceans are open to our naval vessels, our merchant vessels, and our fishermen. As Assistant Secretary of State Thruston M. Morton, writing for the Secretary, said to Senator Hugh Butler, Chairman of the Senate Committee on Interior and insular Affairs, in a letter of March 4, 1953 (Hearings, S. Committee on Interior and Insular Affairs, S. J. Res. 13, 83d Cong., 1st Sess., 27):

> * * * the general policy of the United States is to support the principle of freedom of the seas. Such freedom is essential to its national interests. It is a time-honored principle of its concept of defense that the greater the freedom and range of its warships and aircraft, the better protected are its security interests. It is axiomatic of its commercial interests that the maintenance of free lanes and air routes is vital to the preeminence of its shipping tonnage and air transport. And it is becoming evident that its fishing interests depend in part, and may come more so to depend in the future, upon fishing resources in seas adjacent to the coasts of foreign states.

Similarly, the Navy Department, in a letter of April 25, 1952, to the Chairman of the House Judiciary Committee, wrote (H. Rept. No. 2515, 82d Cong., 2d Sess., p. 18; Cong. Doc. Ser. No. 11578):[23]

> The United States has always been one of the world's foremost advocates of freedom of the seas * * * because of this the Navy has always advocated the 3-mile limit of territorial waters delimited in such way that the outer limits thereof closely follow the sinuousities of the coast line * * * The time-honored position of the Navy is that the greater the freedom and range of its warships and aircraft, the better protected are the security interests of the United States because greater utilization can be made of warships and military aircraft.

The consistent adherence of the United States to this policy, and its specific embodiment in the criteria described by the State Department for the delimitation of inland waters and the territorial sea, are fully demonstrated by the following historical review.

a. *Territorial waters begin at the low-water line on relatively straight coasts*

With respect to the delimitation of the territorial waters of the United States along a relatively straight coast, the State Department letter of November 13,

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[23] This letter is printed in full in the appendix to the Reply Brief for the United States before the Special Master, pp. 80–84.

1951, said that the United States had traditionally used the low-water line along the shore as the baseline from which to measure the three-mile belt (Appendix "A", *infra,* pp. 6a–7a):

> (a) In the case of a relatively straight coast, with no special geographic features such as indentations or bays, the Department of State has traditionally taken the position that territorial waters should be measured from the low water mark along the coast. This position was asserted as early as 1886 (The Secretary of State, Mr. Bayard, to Mr. Manning, Secretary of the Treasury, May 28, 1886, I, Moore, *Digest of International Law,* 720). It was maintained in treaties concluded by the United States. (See Article 1 of the Convention concluded with Great Britain for the Prevention of Smuggling of Intoxicating Liquors on January 23, 1924, 43 Stat. 1761.) This position was in accord with the practice of other states. (See Article 2 of the Convention between Great Britain, Belgium, Denmark, France, Germany and the Netherlands for regulating the Police of the North Sea Fisheries signed at The Hague, May 6, 1882, 73 *British and Foreign State Papers,* 39, 41, and Article 2 of the Convention between Germany, Denmark, Estonia, Finland, France, the British Empire, Italy, Latvia, Poland and Sweden, relating to the Non-Fortification and Neutralization of the Aaland Islands, concluded at Geneva on October 20, 1921, 9 *League of Nations Treaty Series,* 212, 217). The United States maintained the same position at the Conference for the Codification of International Law held at The Hague in 1930. (See

League of Nations, Bases of Discussion for the Conference for the Codification of International Law, II, Territorial Waters, C. 74 M. 39, 1929, V., 143, hereinafter referred to as *Bases of Discussion.*) The report of the Second Sub-Committee adopted the low water mark as the base line for the delimitation of territorial waters. (League of Nations. Acts of the Conference for the Codification of International Law, III, Territorial Waters, C. 351 (b) M. 145 (b), 1930, V., 217, hereinafter referred to as *Acts of Conference.*)

California concedes (Brief, 84) that by 1952 it was the position of the United States to measure its marginal belt from the low-water mark "[w]here the shore of the mainland is in direct contact with the open sea." Consequently we need not amplify on the precedents cited under paragraph (a) of the State Department letter, *supra,* to support that proposition.

b. On coasts with minor curvatures territorial waters begin at low-water line and not at straight baselines

(1) *The State Department's Statement of the Position of the United States*

The State Department letter of November 13, 1951, said that in the case of coasts having minor curvatures or indentations not amounting to bays, it was likewise the established practice of the United States to measure the marginal belt from the low-water line (Appendix "A", *infra,* pp. 7a–8a):

> (b) The Department of State has also taken the position that the low water mark along the coast should prevail as the base line for the

delimitation of territorial waters in the case of a coast with small indentations not equivalent to bays: the base line follows the indentations or sinuosities of the coast, and is not drawn from headland to headland. This position was already established in 1886. (See the letter from the Secretary of State Mr. Bayard to Mr. Manning, Secretary of the Treasury, dated May 28, 1886, *supra*). The United States maintained this position at the Hague Conference of 1930 (See Amendments to Bases of Discussion proposed by the United States, *Acts of Conference,* 197). The principle that all points on the coast should be taken into account in the delimitation of territorial waters was adopted in the report of the Second Sub-Committee (*Acts of Conference,* 217).

(2) *The Historical Materials Support the State Department's Statement*

History fully substantiates this description of the position taken by the United States. From the beginning, it has been made clear that the shoreline rule was subject to no exception in the case of coastal curvatures or indentations unless they amounted to bays, estuaries, or mouths of rivers. The document regularly cited as first announcing American adherence to the three-mile limit, Secretary of State Thomas Jefferson's letter of November 8, 1793, to George Hammond, the British Minister, said (1 Moore, *Digest of International Law* (1906) 702–703; H. Exec. Doc. No. 324, 42d Cong., 2d Sess. (Cong. Doc. Ser. No. 1521), pp. 553–554):

> Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league or three geographical miles *from the seashores.* * * *
>
> For the jurisdiction of the *rivers and bays* of the United States, the laws of the several States are understood to have made provision, and they are, moreover, as being landlocked, within the body of the United States. [Emphasis added.]

Similarly, Secretary of State Timothy Pickering, writing on September 2, 1796, to the Lieutenant Governor of Virginia, said (1 Moore, *Digest of International Law* (1906) 704):

> Our jurisdiction * * * has been fixed (at least for the purpose of regulating the conduct of the government in regard to any events arising out of the present European war) to extend three geographical miles (or nearly three and a half English miles) *from our shores;* with the exception of any waters or bays which are so landlocked as to be unquestionably within the jurisdiction of the United States, be their extent what they may. [Emphasis added.]

On January 23, 1849, Secretary of State James Buchanan wrote to Mr. Jordan (1 Moore, *Digest of International Law* (1906) 705):

> The exclusive jurisdiction of a nation extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of sea inclosed by headlands; and, also, to the distance of a marine

> league, or as far as a cannon-shot will reach from the shore along all its coasts.[29]

The same position was taken in a letter of August 13, 1855, by the American Ambassador to Spain to the Spanish Foreign Minister. 11 Manning, *Diplomatic Correspondence of the United States, Inter-American Affairs, 1831–1860* (1939) 878–879;[30] and by John Davis, Assistant Secretary of State, in writing on February 14, 1884, to Mr. Osborn (1 Moore, *Digest of International Law* (1906) 718).

This question received even more explicit consideration in a letter written by Secretary of State Thomas Bayard to Secretary of the Treasury Daniel Manning on May 28, 1886. The purpose of that letter was to advise Secretary Manning of the limits of the territorial waters of the United States in Alaska, for purposes of revenue law enforcement.[31] Secretary Bayard reviewed at some length the position that the United States had taken regarding maritime limits on the Atlantic coast, particularly in relations with Great Britain, and concluded that our position must necessarily be the same as to the Alaskan coast. After stating the general three-mile

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[29] This passage is significant for its discriminating use of the terms "shore" and "coast." Strictly speaking, the shore is where land and water meet, whereas the coast comprises the shore of the open sea and the line marking the outer limit of inland waters that open onto the sea; but this distinction has not always been observed, particularly by earlier writers. See *United States* v. *Louisiana*, 363 U.S. 1, 66–67, n. 108.

[30] This was done pursuant to specific instructions of Secretary of State William L. Marcy, 11 Manning, *Diplomatic Correspondence of the United States, Inter-American Affairs, 1831–1860* (1939), 214, 217.

[31] Because of its importance as a definition of the position

rule, with citation of materials reflecting our adherence to it, Secretary Bayard continued (1 Moore, *Digest of International Law* (1906) 718, 719–720):

> Whether the line which bounds seaward the three-mile zone follows the indentations of the coast or extends from headland to headland is the question next to be discussed.
>
> The headland theory, as it is called, has been uniformly rejected by our Government, as will be seen from the opinions of the Secretaries above referred to. The following additional authorities may be cited on this point:
>
> President Woolsey makes the following comment on the "headland" claim: "But such broad claims have not, it is believed, been much urged, and they are out of character for a nation that has ever asserted the freedom of doubtful waters as well as contrary to the spirit of more recent times." [32]
>
> In an opinion of the umpire of the London commission of 1853, it was held that: "It can not be asserted as a general rule, that nations have an exclusive right of fishery over all adjacent waters to a distance of three marine miles beyond an imaginary line drawn from headland to headland."

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of the United States, this letter is reprinted in full in Appendix "A," *infra*, p. 13a.

[32] Woolsey, *International Law* (2d ed. 1867), p. 85. In later editions there was added the comment, said to have had the approval of Professor Woolsey before his death, "[Moreover the United States in the 'headland question' during its fishery disputes with Great Britain has maintained the contrary.]" *E.g.*, 6th ed., 1899, p. 77; see Preface to the Sixth Edition, page v.

The reply of the United States (*id.*, 143–144) quoted various diplomatic and judicial statements on the subject, including Secretary Bayard's letter of May 28, 1886, to Secretary Manning, *supra*, and was summarized by the Preparatory Committee as follows (*id.*, 36):

> The reply of the United States * * * shows that the position adopted by that Government is that, so far as territorial authority is concerned, sovereignty does not extend beyond three miles from low-water mark and that the seaward boundary of this zone follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt.

With respect to this question, the Preparatory Committee submitted Basis of Discussion No. 6 (*id.*, 39; *Acts of Conference*, 179):[34]

> Subject to the provisions regarding bays and islands, the breadth of territorial waters is measured from the line of low-water mark along the entire coast.

During the conference, the United States submitted various proposed amendments to the bases of discussion, including one combining No. 3 (fixing the breadth of territorial waters at three nautical miles) and No. 6, as follows (*Acts of Conference*, 197):

> Except as otherwise provided in this Convention, the seaward limit of the territorial waters

[34] *Acts of the Conference for the Codification of International Law; Meetings of the Committees;* Vol. III, *Minutes of the Second Committee—Territorial Waters* (L.N. Doc. C.351(b).M. 145(b).1930.V).

> is the envelope of all arcs of circles having a radius of three nautical miles drawn from all points on the coast (at whatever line of sea level is adopted in the charts of the coastal State), or from the seaward limit of those interior waters which are contiguous with the territorial waters [referring to an accompanying illustration].

Departure from use of the waterline as the baseline was "otherwise provided" by the American proposals only in the cases of bays and estuaries, which were limited to an entrance width of ten miles and a test of area in relation to entrance width (the so-called "Boggs formula"), discussed below (*id.*, 197–199; *infra*, pp. 67–68), and in the cases of ports, roadsteads and straits (*id.*, 200–201).[35] The American proposal provided that the belt of territorial waters should be measured from the headland-to-headland line in the case of bays meeting the prescribed standards, and that "Otherwise the belt of territorial waters shall be measured outward from all points on the coast line" (*Acts of Conference*, 199).

These actions by the Department of State through the years, from 1793 to 1930, support the statement in Acting Secretary Webb's letter of November 13, 1951, that in the case of a coast with small indentations not equivalent to bays, the United States had always adhered to the rule that the territorial waters

[35] The American delegation proposed no change of Basis of Discussion No. 18, which included the provision, "The waters of a river are inland waters down to the point at which it flows directly into the sea, whatever be its breadth at that point." *Bases of Discussion*, 63; *Acts of Conference*, 180.

must be measured from the water line on the shore.

In the *Fisheries Case* (*United Kingdom* v. *Norway*), I.C.J. Reports, 1951, p. 116, the International Court of Justice held that in the geographic, economic and historic situation there presented, Norway did not violate international law in measuring its territorial sea from straight baselines drawn between salient points and offshore islands and rocks. Necessarily, the United States accepts that decision as a statement of international law. However, as pointed out in Secretary Acheson's letter of February 12, 1952 (Appendix "A", *infra*, p. 11a), the decision was only that international law permitted nations to use such lines, not that it required them to do so. Since the United States has not chosen to follow that course, it is unnecessary to consider whether the California coast does or does not present a situation where such lines would be permissible.

Similarly, while Article 4 of the Convention on the Territorial Sea and the Contiguous Zone [36] permits, but does not require, a coastal nation to draw straight baselines along the coast in certain circumstances, there is a prerequisite to any such assertion:

> The coastal State [*i.e.*, nation] must clearly indicate straight baselines on charts, to which due publicity must be given. [106 Cong. Rec. 11174.]

Since the United States has taken no such action, there are no operative straight baselines on the California coast today, just as there were none in 1952,

[36] See *supra*, p. 35, n. 19.

when the Special Master made his report, or in 1953, when Congress defined the area given to the State by the Submerged Lands Act.

(3) *The Materials Cited by California Do Not Refute the State Department's Statement*

California attempts to show (Brief, 50–64, 73–85) that the United States has not in fact adhered to the principles set forth in the State Department letters. Most of the situations cited relate to bays, straits or islands, and will be discussed below in connection with those subjects. On the subject of coastal indentations not amounting to bays, California adduces only meager data. The principal item is a long quotation from Kent's Commentaries (Brief, 50–53), advocating that the United States claim jurisdiction over a marginal belt of four leagues (twelve nautical miles) measured from straight lines drawn between remote headlands, such as "from the south cape of Florida to the Mississippi." 1 Kent, *Commentaries on American Law* (3d ed., 1836) 25–30. However, a reading of the quoted passage makes it abundantly clear that Chancellor Kent was only describing an area over which he thought that "it would not be unreasonable" for the United States to assume control; he was not purporting to describe what the United States had actually done.[37] Indeed, his description of what the United States had in fact claimed was quite different (Calif. Brief, 51, 52):

[37] See Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927) 359–360. It was this suggestion by Chancellor Kent which was the subject of Professor Woolsey's disapproval in the passage referred to at fn. 32, *supra*, p. 57.

> According to the current of modern authority, the general territorial jurisdiction extends into the sea as far as cannon shot will reach, and no farther, and this is generally calculated to be a marine league; and the congress of the United States have recognized this limitation, by authorizing the Districts Courts to take cognizance of all captures made within a marine league of the American shores. * * *
> * * * In 1793, our government thought they were entitled, in reason, to as broad a margin of protected navigation as any nation whatever, though at that time they did not positively insist beyond the distance of a marine league from the sea shores * * *.

California points to some rather general statements, such as Secretary of State Buchanan's letter of January 23, 1849, to Mr. Jordan (*supra,* p. 55) asserting jurisdiction over "adjacent parts of the sea enclosed by headlands," as supporting the straight baseline system. However, it can hardly be said that mere coastal curvatures are "enclosed" by headlands; and even if those rather general statements were to be considered ambiguous in this respect, that possible ambiguity falls far short of establishing that such was actually the practice of the State Department, contrary to the very explicit positions taken on the subject in other documents quoted above.[38]

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[38] An excerpt from a letter of President Jefferson to Secretary of the Treasury Albert Gallatin, September 8, 1804, quoted by California (Brief, 56), might seem to support a straight baseline position wherever one can see from one headland to another; but California cities the letter only as relating to the permissible distance between headlands of

It is evident from this review that up to, and through the enactment of the Submerged Lands Act, the United States had always taken the position that the marginal belt must be measured from the water line on the shore, except in the case of actual bays or other well-defined bodies of water, and had not accepted the view that baselines could be drawn from point to point, across mere curvatures or indentations of the coast. There remains of course, the question of what indentations have been recognized by the United States as "bays" within this rule, and we turn next to that subject.

c. *Until 1961 the United States claimed nonhistoric bays as inland waters only where they were substantial indentations and could be enclosed by a line not over ten geographical miles long*

(1) *The State Department's Statement of the Position of the United States*

The State Department letter of November 13, 1951, went on to say that, subject to historic exceptions, the United States recognized bays, gulfs, and estuaries as inland waters only where they could be enclosed by a line not over ten geographical miles in length, and were more than slight indentations of the coast (Appendix "A", *infra,* pp. 8a–9a):

> (c) The determination of the base line in the case of a coast presenting deep indentations

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bays, and an examination of the entire letter discloses that a bay was its actual subject. It related solely to the question of where to draw the lines delimiting common law jurisdiction, admiralty jurisdiction, and the high seas at the entrance to New York Bay. 11 *Writings of Thomas Jefferson* (Memorial ed., 1904) 48.

such as bays, gulfs, or estuaries has frequently given rise to controversies. The practice of states, nevertheless, indicates substantial agreement with respect to bays, gulfs or estuaries no more than 10 miles wide: the base line of territorial waters is a straight line drawn across the opening of such indentations, or where such opening exceeds 10 miles in width, at the first point therein where their width does not exceed 10 miles. (See Article 2 of the Convention between Great Britain, Belgium, Denmark, France, Germany and the Netherlands, for regulating the Police of the North Sea Fisheries, signed at The Hague, May 6, 1882, 73 *Foreign and British State Papers*, 39, 41;[39] The North Atlantic Coast Fisheries Arbitration between the United States and Great Britain of September 7, 1910; *U.S. Foreign Rel.*, 1910 at 566; and the Research in International Law of the Harvard Law School, 23 American Journal of International Law, SS, 266).

Subject to the special case of historical bays, the United States supported the 10 mile rule at the Conference of 1930 (*Acts of Conference,* 197–199) and the Second Sub-Committee adopted the principle on which the United States relied (*Acts of Conference,* 217–218). It was understood by most delegations that, as a corollary to the adoption of this principle, a system would be evolved to assure that slight indentations would not be treated as bays (*Acts of Conference,* 218). The United States proposed a method to determine whether a particular indentation of the coast should be regarded

[39] Reprinted in S. Exec. Doc. No. 113, 50th Cong., 1st Sess., p. 18 (Cong. Doc. Ser. No. 2512).

as a bay to which the 10 mile rule would apply (*Acts of Conference,* 197–199). The Second Sub-Committee set forth the American proposal and a compromise proposal offered by the French delegation in its report, but gave no opinion regarding these systems (*Acts of Conference,* 218–219).

The method there referred to, proposed by the United States at the 1930 conference as a means of determining whether a bay was more than a "slight indentation" of the coast, was the so-called Boggs formula.[40] The starting point of the formula was to compare the coastal indentation with a semicircle;[41] if it proved to be more open than a semicircle, it was treated as a mere curvature of the coast, while if it proved to be at least as much enclosed as a semicircle, it was accepted as a bay. This comparison was made by comparing the area of the indentation with the area of a semicircle whose diameter equaled the length of the closing line across the mouth of the indentation; but rather than making the comparison directly, a modification was introduced. To give greater regularity to the shape of the indentation, Dr. Boggs suggested that a belt (analogous to a small marginal belt) be drawn around the shore of the indentation, having a width equal to one-fourth the length of the closing line across the entrance. The remaining area was then compared with the area of a semicircle correspondingly reduced to have a diameter

[40] After S. Whittimore Boggs, then Geographer of the State Department and one of the American representatives at the conference. See *Acts of Conference,* 10.

[41] See 1 Shalowitz, *Shore and Sea Boundaries* (1962) 38.

equal to one half of the length of the closing line across the indentation. *Acts of Conference,* 198.[42]

In the proceedings before the Special Master the United States suggested that the Boggs formula, although not a binding principle of international law, afforded an appropriate standard for determining whether a coastal indentation was "landlocked"; and the Special Master accepted it as such. Report, 25–26. The formula, however, has not won general acceptance. Article 7 of the Convention on the Territorial Sea and the Contiguous Zone adopted the principle of direct comparison with a semicircle, without the modification made by the Boggs formula (106 Cong. Rec. 11174):

> For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An

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[42] A more detailed explanation of this proposal appears in Boggs, "Delimitation of the Territorial Sea," 24 *American Journal of International Law*, 541.

California criticizes the formula, saying (Brief, 103, fn. 56) that "an application of the formula to San Diego Bay * * * would result in a determination that that bay does not have sufficient depth to qualify. (See Shalowitz, *op. cit.* [*Shore and Sea Boundaries*, vol. 1 (1962)]38.)" What Shalowitz actually says is (*id.* at 38–39):

"For example, it has been contended that if the proposed technical method (using one-quarter the headland-to-headland distance as a radius for the arcs of circles within the bay) were applied to such a landlocked indentation as San Diego Bay it would have the effect of classifying the bay as part of the high seas. * * * This could only result from a misreading of the basic principle of the method. * * *"

> indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semicircle whose diameter is a line drawn across the mouth of that indentation.

Since the Convention represents the present policy of the United States,[45] and since direct comparison with a semicircle is an equally appropriate test of whether an indentation is "landlocked" (which has always been the underlying standard), we now suggest that it be accepted in place of the Boggs formula for purposes of this case. See Supplemental Complaint, Par. X(b), pp. 17–18. In any event, as the Special Master pointed out, there is no coastal indentation in California, less than 10 miles wide, that was disqualified as inland waters merely for failure to comply with the Boggs formula. Report, pp. 25–26.[46]

(2) *The Historical Materials Support the State Department's Statement*

(a) *Background.*—It is a common law principle of great antiquity that a bay or other coastal indentation will be recognized as subject to domestic jurisdiction (i.e., inland waters) only when its entrance is of limited size. This history affords a helpful background to an understanding of the early position of the United States.

According to Justice Blackburn, speaking for the Judicial Committee of the Privy Council in *Direct*

[45] See *supra*, p. 35, fn. 19.

[46] The basis for California's suggestion to the contrary (Calif. Exceptions, p. 8) is not indicated.

United States Cable Company v. *Anglo-American Telegraph Company* (1877) L.R. 2 A.C. 394, 416–417:

> The earliest authority on the subject is to be found in the grand abridgment of *Fitzherbert* "Corone," 399, whence it appears that in the 8 Edw. 2,[45] in a case in Chancery (the nature and subject-matter of which does not appear), *Staunton,* J., expressed an opinion on the subject. There are one or two words in the common printed edition of *Fitzherbert* which it is not easy to decipher or translate, but subject to that remark this is a translation of the passage: "*Nota per Staunton,* J., that that is not [sance which Lord *Coke* translates 'part'] of the sea where a man can see what is done from one part of the water and the other, so as to see from one land to the other; that the coroner shall come in such case and perform his office, as well as coming and going in an arm of the sea, there where a man can see from one part to the other of the [a word not deciphered], that in such a place the country can have cognusance, &c."[46]

Justice Blackburn pointed out that this was followed by both Sir Edward Coke[47] and Sir Matthew Hale,[48] and continued (p. 417):

> Neither of these great authorities had occasion to apply this doctrine to any particular

[45] *I.e.*, 1314–1315 A.D.

[46] The original passage by Fitzherbert, with the same translation, appears in Fulton, *Sovereignty of the Sea* (1911) 547–548, fn. 2.

[47] Coke, 4 *Institutes of the Laws of England* (1787 ed.), Cap. 22, p. 140.

[48] Hale, *De Jure Maris* (Hargrave, *Collection of Tracts Relative to the Law of England* (1787), p. 10).

> place, nor to define what was meant by seeing or discerning. If it means to see what men are doing, so, for instance, that eye-witnesses on shore could say who was to blame in a fray on the waters resulting in death, the distance would be very limited; if to discern what great ships were about, so as to be able to see their manoeuvres, it would be very much more extensive; in either sense it is indefinite. * * *

The test was somewhat more narrowly stated by Chief Justice Shaw, in *Commonwealth* v. *Peters,* 12 Metcalf (53 Mass.) 387, 392:

> All creeks, havens, coves, and inlets lying within projecting headlands and islands, and all bays and arms of the sea lying within and between lands not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side, are taken to be within the body of the county.

The same justice specifically related this to the baseline of the marginal sea in *Dunham* v. *Lamphere,* 3 Gray (69 Mass.) 268, 270:

> We suppose the rule to be, that these limits [of the State] extend a marine league, or three geographical miles, from the shore; and in ascertaining the line of shore this limit does not follow each narrow inlet or arm of the sea; but when the inlet is so narrow that persons and objects can be discerned across it by the naked eye, the line of territorial jurisdiction stretches across from one headland to the other of such inlet.

However it might be qualified, the range of vision was bound to be a vague and unsatisfactory test; and

each country exclusive fishing rights within three miles of its own coasts, and continued:

> It is equally agreed, that the distance of 3 miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries, shall, with respect to bays, the mouths of which do not exceed 10 miles in width, be measured from a straight line drawn from headland to headland.

There was a similar agreement between Great Britain and the North German Government in 1868. See 14 Hertslet, *Commercial Treaties* (1880), 1055, 1057–1058. Article II of the North Sea Fisheries Convention of May 6, 1882, between Great Britain, Germany, Belgium, Denmark, France, and The Netherlands, contained a similar provision which did not apply the ten-mile limit merely at the mouth of a bay but also allowed it, in the case of bays with wider mouths, at the first point where the bay narrowed to ten miles (S. Exec. Doc. No. 113, 50th Cong., 1st Sess. (Cong. Doc. Ser. No. 2512) 18, 19):

> As regards bays, the distance of 3 miles shall be measured from a straight line drawn across the bay in the part nearest the entrance, at the first point where the width does not exceed 10 miles.

For reference to other European treaties containing similar provisions, see the Memorial of the United Kingdom, 1 *Pleadings, Oral Arguments, Documents: The Fisheries Case* (*United Kingdom* v. *Norway*), *I.C.J.*, pp. 62–63.

Later, many nations took the view that the ten-mile rule had achieved the status of a general rule of in-

ternational law. See the Memorial of the United Kingdom, *supra,* pp. 65–66. It was the rule most favored by nations responding to the questions of the Preparatory Committee for the 1930 League of Nations Conference for the Codification of International Law, and was embodied by that committee in its Basis of Discussion No. 7. *Bases of Discussion,* 39–45. It was likewise the rule adopted by the Second Sub-Committee in its draft articles. *Acts of Conference,* 217. However, in *The Fisheries Case* (*United Kingdom* v. *Norway*), *I.C.J. Reports,* 1951, pp. 116, 131, the court said:

> * * * the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.

(b) *Actions of the United States.*—The position of the United States has followed the same general course of development outlined above. The earliest official statements used such terms as "landlocked," which, though indefinite, clearly connote some limitation on both the size and the shape of the areas involved. *E.g.,* "landlocked, within the body of the United States" (letter of November 8, 1793, from Thomas Jefferson, Secretary of State, to George Hammond, British Minister, *supra,* p. 54); "so landlocked as to be unquestionably within the jurisdiction

of the United States"[52] letter of September 2, 1796, from Timothy Pickering, Secretary of State, to the Lieutenant Governor of Virginia, *supra*, p. 55); "inclosed by headlands" (letter of January 23, 1849, from James Buchanan, Secretary of State, to Mr. Jordan, *supra*, p. 55).

These rather general expressions soon gave way to a very specific insistence on the six-mile rule, sometimes modified by proposals to adopt a ten-mile rule by agreement, in connection with our protracted dispute with Great Britain over fishing rights along the Atlantic coasts of British North America.[53] That dispute had many aspects, but for present purposes it is enough to say that Article III of the Treaty of American Independence, September 3, 1783, 8 Stat. 80, 82, secured to American fisherman certain rights, incuding that of fishing in the coastal waters of British North America, and that this was modified by Article 1 of the Treaty of October 20, 1818, 8 Stat. 248, 249, which specified certain coasts where American fishing rights should continue, and provided:

> And the United States hereby renounce, forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbours, of his

[52] It is evident that the ensuing phrase, "be their extent what they may," referred to the expanse of the waters inside the headlands, not to the width of the entrance, so that within a "landlocked" bay the three-mile rule would have no application.

[53] For an account of this dispute, see 1 Moore, *Digest of International Law* (1906), 767–874.

Britannic Majesty's dominions in America, not included within the abovementiond limits. * * *

Beginning, apparently, about 1836,[54] the British construed this reference to "bays" as including very large arms of the sea such as the Bay of Fundy[55] and Chaleur Bay. The United States, on the contrary, insisted that the treaty referred only to such bays as were subject to British sovereignty, and that

[54] See 1 Moore, *Digest of International Law* (1906), 783.

[55] On May 10, 1843, the American schooner *Washington* was seized by the British for fishing in the Bay of Fundy, ten miles from shore. The resulting American claim was one of those submitted to arbitration under the treaty of February 8, 1853, 10 Stat. 988. On disagreement of the American and British commissioners, the matter was submitted to the Umpire, Joshua Bates, who on December 23, 1854, decided in favor of the United States. Pointing out that the Bay of Fundy is from 65 to 75 miles wide, he rejected the British claim to it, saying,

"This doctrine of headlands is new, and has received a proper limit in the convention between France and Great Britain of 2d August 1839, in which 'it is agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.'"

S. Exec. Doc. No. 103, 34th Cong., 1st Sess., pp. 170, 184, at 185-186; see also 45, 55-56. (Cong. Doc. Ser. No. 824).

In the meantime, Great Britain, as a gesture of conciliation, had given up its claim to the Bay of Fundy, but without conceding that the claim was unsound, and without relinquishing its claims to other large arms of the sea. Letters from the Earl of Aberdeen, British Foreign Minister, to Edward Everett, American Minister to Great Britain, March 10 and April 21, 1845. S. Doc. No. 72, 61st Cong., 3d Sess., vol. 2, pp. 488 and 505 (Cong. Doc. Ser. No. 5930).

international law limited those to bays not over six miles wide at the entrance. This dispute was suspended for a time by the so-called Reciprocity Treaty of June 5, 1854, 10 Stat. 1089, which gave British and American fishermen common rights of sea fishery, including fishery in bays and the three-mile belt, north of the 36th parallel (about Albemarle Sound, North Carolina), with provision for commissioners to delimit the areas to which it applied. However, the United States terminated that treaty, in accordance with its terms, on March 17, 1866.[56]

The question of the extent of American rights under international law and the 1818 treaty immediately recurred, and on April 10, 1866, William H. Seward, Secretary of State, wrote to Charles Francis Adams, American Minister to Great Britain (*Diplomatic Correspondence of the United States,* 1866, Pt. 1, p. 98):

> I send you a copy of a very suggestive letter from Mr. Richard D. Cutts, who, perhaps, you are aware, was employed, as surveyor for marking, on the part of the United States, the fishery limits under the reciprocity treaty. Mr. Cutts's long familiarity with that subject practically and theoretically entitles his suggestions to respect.

Mr. Cutts' letter to Secretary Seward, dated April 7, 1866 (*id.,* 98–101), reviewed the history of the dispute and said (*id.* at 100):

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[56] Joint Resolution of January 18, 1865, 13 Stat. 566; letter from Charles Francis Adams, American Minister, to Lord Russell, British Foreign Secretary, March 17, 1865, *Diplomatic Correspondence of the United States*, 1865, Pt. 1, p. 259; see also *id.*, 93 and 184.

> In the opinion of this government, repeatedly announced at different periods, the American fishermen have a clear right to the use of the fishing grounds lying off the provincial coasts, whether in the main ocean or in the inland seas, provided they do not approach within three marine miles of such coasts, or of the entrance to any bay, creek, or harbor not more than 6 miles in width; and to such bays only does the renunciatory clause in the first article [of the 1818 treaty] apply. * * *

Following the termination of the Reciprocity Treaty, Americans were allowed to fish in British waters by license, until 1870,[57] at which time the British, without abandoning their claims, suspended active assertion of them. A Canadian regulation of May 14, 1870,[58] adopting for the time being the ten-mile rule as defining "bays" under the 1818 treaty, was even modified on June 27, 1870, at the direction of the British government, to substitute a six-mile rule.[59]

The Treaty of Washington, May 8, 1871, 17 Stat. 863, reinstated the common right of sea fishery as under the Reciprocity Treaty, but only north of the 39th parallel (just north of Cape May, New Jersey). Arts. XVIII–XXI, 17 Stat. 869–870. Its provisions were to remain in effect for ten years, and until two

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[57] See 1 Moore, *Digest of International Law* (1906), 792; S. Exec. Doc. No. 113, 50th Cong., 1st Sess., 57 (Cong. Doc. Ser. No. 2512).

[58] *North Atlantic Coast Fisheries Arbitration*, S. Doc. No. 870, 61st Cong., 3d Sess., vol. 2, Appendix to the Case of the United States, Pt. 1, pp. 582, 584–585 (Cong. Doc. Ser. No. 5930).

[59] *Id.*, pp. 611, 613–614. See H. Exec. Doc. No. 89, 45th Cong., 2d Sess., Vol. 1, pp. 120–121 (Cong. Doc. Ser. No. 1810).

years after either party gave notice of termination thereafter (so that the Treaty would remain in force for at least twelve years in all). Art. XXXIII, 17 Stat. 874. Great Britain contended that the fishery rights that it accorded to the United States under this provision were more valuable than those it received; and Articles XXII–XXV, 17 Stat. 870–872, provided for a commission to sit at Halifax, Nova Scotia, to arbitrate that claim and award to Great Britain the amount, if any, by which the value of its concessions was found to exceed that of its benefits. The Commission met from June 15 to November 23, 1877. *Documents and Proceedings of the Halifax Commission,* H. Exec. Doc. No. 89, 45th Cong., 2d Sess., Vol. 1, pp. 11–76 (Cong. Doc. Ser. No. 1810). In those proceedings, the United States contended that the only rights to be valued were those given by the treaty, to which the parties were not entitled under the law of nations, and that so far as bays were concerned, this included only bays less than six miles wide at the mouth:

> In the case of bays and gulfs, such only are territorial waters as do not exceed six miles in width at the mouth, upon a straight line measured from headland to headland. * * *
>
> The United States insist upon the maintenance of these rules; believing them to conform to the well-established principles of international law, and to have received a traditional recognition from other powers, including Great Britain. [Answer on Behalf of the United States to the Case of Her Britannic Majesty's Government, *id.,* 119, 120.]

> * * * [T]he inevitable conclusion is, that, prior to the Treaty of Washington, the fishermen of the United States, as well as those of all other nations, could rightfully fish in the open sea more than three miles from the coast; and could also fish at the same distance from the shore in all bays more than six miles in width, measured in a straight line from headland to headland.
>
> The privileges accorded by Article XVIII of that treaty are, to take fish within the territorial waters of the British North American colonies; and the limits of territorial waters have been thus defined by the law of nations. [Brief for the United States upon the Question of the Extent and Limits of the Inshore Fisheries and Territorial Waters on the Atlantic Coast of British North America, *id.*, 139, 166.][60]

The Commission, without ruling on that or other legal questions, on November 23, 1877, awarded Great Britain $5,500,000. *Id.*, 76. Thereafter, on July 1, 1885, the United States terminated the fishery provisions of the treaty, as permitted by Article XXXIII.[61]

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[60] These statements of the extent of national sovereignty over bays applied, of course, as much to the definition of the rights that the United States had relinquished by the treaty on its own coasts as to the definition of the rights it had acquired on British coasts. Cf. Calif. Brief, p. 85.

[61] Joint Resolution of March 3, 1883, 22 Stat. 641. Letter from James Russell Lowell, American Minister, to Lord Granville, British Foreign Minister, July 2, 1883. *Foreign Relations of the United States*, 1883, p. 441; Presidential Proclamation No. 8, January 31, 1885, 23 Stat. 837; H. Exec. Doc. No. 1, 49th Cong., 1st Sess., Pt. 1, p. 466 (Cong. Doc. Ser. No. 2368).

On November 15, 1886, Secretary of State Thomas F. Bayard sent to E. J. Phelps, American Minister to Great Britain, a draft for an agreement to settle the dispute. S. Exec. Doc. No. 113, 50th Cong., 1st Sess., 4–7 (Cong. Doc. Ser. No. 2512). The first article of that proposal called for appointment of a mixed commission to delimit the bays from which Americans could be excluded under the 1818 treaty, and provided (*id.*, 7) that those bays—

> are hereby agreed to be taken to be such bays and harbors as are 10 or less than 10 miles in width, and the distance of 3 marine miles from such bays and harbors shall be measured from a straight line drawn across the bay or harbor, in the part nearest the entrance, at the first point where the width does not exceed 10 miles * * *.

That proposal was submitted to Lord Iddesleigh, the British Foreign Secretary, on December 3, 1886 (*id.*, 29), and on March 24, 1887, his successor, the Marquis of Salisbury, replied (*id.*, 46), enclosing a memorandum containing in parallel columns Mr. Bayard's proposal and British commentary thereon (*id.*, 48–52), objecting, among other things, to the ten-mile proposal for bays, on the ground that it would require Great Britain to give up its exclusive rights in areas recognized as territorial waters by the law of nations. On July 12, 1887, Secretary Bayard sent back the same memorandum, with a third column added containing the American reply to the British commentary (*id.*, 56–65). In this he asserted that the United States could have insisted on a six-mile limit, but

explained that we were willing to agree to ten miles for practical reasons, and in view of the various treaty precedents (*id.*, 56–57):

> The width of ten miles was proposed, not only because it had been followed in Conventions between many other powers, but also because it was deemed reasonable and just in the present case; this Government recognizing the fact that, while it might have claimed a width of six miles as a basis of settlement, fishing within bays and harbors only slightly wider would be confined to areas so narrow as to render it practically valueless and almost necessarily expose the fishermen to constant danger of carrying their operations into forbidden waters. A width of more than ten miles would give room for safe fishing more than three miles from either shore, and thus prevent the constant disputes which this Government's proposal, following the Conventions above noticed, was designed to avert.

He went on to point out that from 1854 to 1870, American fishermen were allowed in all the territorial waters of the provinces, either by treaty provision or under a license arrangement, and that in 1870 the Canadian authorities issued regulations adopting a ten-mile rule for bays, which were modified at the request of the British authorities by substituting a six-mile rule.[62] While those regulations were only an interim arrangement, he referred to them to refute Lord Salisbury's assertion that the ten-mile rule would require Britain to give up areas where its exclusive right was "unquestioned."

[62] See *supra*, p. 79.

Despite British reluctance, a treaty was finally signed on February 15, 1888, which did embody the ten-mile rule for bays. S. Misc. Doc. No. 109, 50th Cong., 1st Sess., 155, 156 (Cong. Doc. Ser. No. 2517).[63] However, the Senate Committee on Foreign Relations reported unfavorably, partly because it considered the ten-mile provision an unjustifiable abandonment of the six-mile rule on which the United States was entitled to insist. That report, after reviewing the history of the fishery dispute (*id.*, 1–17), criticized various aspects of the proposed treaty. Regarding the provision for ten-mile bays, it said (*id.*, 21):

> The question of the extent of territorial dominion, as it respects the exercise of fishing rights in bays more than 6 miles wide indenting the shores of a country, must of course be determined by the law and practice of nations as they existed in the year 1818, at which time, as the committee thinks, the 3-miles limit from shores was recognized without regard to large indenting bays, except under very peculiar circumstances, such as the prescriptive exercise of dominion, etc. Whether, in view of recent inventions in the implements of warfare, it may not be politic for maritime nations to agree upon an enlargement of the boundaries of their territorial dominion seaward is a question well worthy of consideration, but it has no place in respect of the matters now in hand.

The committee rejected the provisions of the North Sea Fisheries Convention as a precedent, saying

[63] As to certain named bays, Art. IV described longer lines of exclusion. *Id.*, 156–157.

(*ibid.*), "* * * first, they did not admit territorial dominion as existing over bays more than 6 miles wide, but conferred it for the time being and for a limited purpose * * *."

It is thus evident that the Senate committee took the view that in 1818 six miles was the maximum width of a bay that could be regarded as inland waters (with historic exceptions),[64] but the committee did not agree with the negotiators that the United Staes could afford to yield its strict rights in this respect and agree to a ten-mile limit for the sake of settling the dispute. The Senate, for this or other reasons, followed the advice of the committee and rejected the treaty, August 21, 1888. 19 Cong. Rec. 7768.[65]

Thereafter the dispute remained dormant, with British authorities refraining from vigorous measures against American ships,[66] until by the Treaty of January 27, 1909, 36 Stat. (Pt. 2) 2141, it was agreed to submit the matter to arbitration under the general arbitration provisions of the Treaty of April 4, 1908, 35 Stat. (Pt. 2) 1960. Several specific questions were

[64] Attached to the Committee Report was a memorandum by William L. Putnam, one of the negotiators of the proposed treaty, indicating that the negotiators were of the same view. See S. Misc. Doc. No. 109, *supra*, Appendix E, pp. 137–147.

[65] For indications that the question of bays played a material part in the rejection of the Treaty, see *e.g.*, 19 Cong. Rec. 6253–6254, 6622, 7289, 7332–7333, 7336–7338, 7341; *cf. id.*, 5101–5102, 6350–6353, 7718.

[66] See Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), 367. Jessup gives a brief summary of the fisheries dispute, including the arbitration, as it related to this question of bays, *id.*, 363–382.

submitted to the arbitrators, the fifth of which was (36 Stat. (Pt. 2) 2142):

> From where must be measured the "three marine miles of any of the coasts, bays, creeks, or harbors" referred to in the said Article [*i.e.*, Art. I of the Convention of October 20, 1818]?

The matter was given exhaustive written and oral presentation, as appears from the 12-volume report of the proceedings, *North Atlantic Coast Fisheries Arbitration,* S. Doc. No. 870, 61st Cong., 3d Sess. (Cong. Doc. Ser. Nos. 5929–5940). The United States took the position, as it had done throughout, that the phrase in the 1818 Treaty, "bays, creeks, or harbours of His Britannic Majesty's Dominions in America," meant such bays as were subject to British sovereignty, and that those were confined, under rules of international law as it was in 1818, to bays not over six miles wide. *Op. cit.,* vol. 8, Argument of the United States, p. 145 (Cong. Doc. Ser. No. 5936).

The ruling of the Arbitration Tribunal was handed down on September 7, 1910. It rejected the American position and held that the 1818 treaty referred to bays in a descriptive and geographic sense, not confined to bays over which Great Britain had territorial jurisdiction. *North Atlantic Coast Fisheries Arbitration,* S. Doc. No. 870, 61st Cong., 3d Sess., vol. 1, Award of the Tribunal, 64, 93 (Cong. Doc. Ser. No. 5929). Furthermore, the tribunal concluded that in 1818 there was no principle of international law

limiting territorial jurisdiction to bays of any particular width (*id.*, 94), saying:

> * * * as no principle of international law recognises any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty, this Tribunal is unable to qualify by the application of any new principle its interpretation of the treaty of 1818 as excluding bays in general from the strict and systematic application of the three mile rule; nor can this Tribunal take cognisance in this connection of other principles concerning the territorial sovereignty over bays, such at ten mile or twelve mile limits of exclusion based on international acts subsequent to the treaty of 1818 and relating to coasts of a different configuration and conditions of a different character * * *.

The tribunal's answer to the fifth question was (*id.*, 97):

> In case of bays, the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. * * *

Recognizing that this was not a satisfactory resolution of the dispute, the tribunal went on to recommend that the parties enter into a treaty adopting certain closing lines or lines of exclusion [67] that it

[67] For certain bays, the tribunal recommended lines of exclusion, which would mark the outer limit of territorial waters without distinguishing inland waters; for other bays it drew closing lines, from which the lines of exclusion would be three miles seaward. The subsequent treaty did likewise, omitting a few of the lines proposed by the tribunal.

described for particular bays, and elsewhere adopting the ten-mile rule. *Id.,* 97–98. Such an agreement was subsequently made by the Treaty of July 20, 1912, 37 Stat. (Pt. 2) 1634.

While this, like most episodes of American insistence on narrow restriction of territorial waters, primarily concerned foreign coasts (it is the nations asserting extensive claims that have controversies regarding their own coasts), it has always been recognized that the same narrow limits that we urged for others must be equally applicable to the United States. As pointed out above (*supra,* p. 81), our own claims were actually involved in the Halifax Arbitration, where it was necessary to evaluate the rights given up by the United States as well as those acquired by it. Obviously, the six-mile limit for bays, which we urged there as defining the area where exclusive national rights of fishery were relinquished by the treaty, referred to bays relinquished by the United States as well as those relinquished by Great Britain.

This principle, that the United States must itself abide by the limitations it asserts against other nations, was the basis on which Secretary of State Bayard, in his letter of May 28, 1886, to Secretary of the Treasury Manning, advised that our steadfast rejection of the headlands theory in this dispute required us to disclaim it also for our own coasts in the Pacific northwest (Appendix "A", *infra,* p. 18a; see also *supra,* p. 56):

> These rights we insist on being conceded to our fishermen in the northeast, where the mainland

> is under the British sceptre. We cannot refuse them to others on our northwest coast, where the sceptre is held by the United States. * * *

Another instance where the United States applied the ten-mile rule to its own coast occurred in the Alaska boundary arbitration of 1903.[68] The Treaty of March 30/18, 1867, 15 Stat. 539, by which the United States acquired Alaska from Russia, described the boundary with Canada, as it had been described in the Anglo-Russian Treaty of February 28/16, 1825, as running in certain circumstances ten leagues inland from the "coast." The Treaty of January 24, 1903, 32 Stat. (Pt. 2) 1961, between the United States and Great Britain provided for an arbitration to construe the boundary description. Great Britain described a line which it urged as the proper "coast" line, which Jacob M. Dickinson, arguing for the United States, criticized as follows:

> This line crosses the Yakutat Bay a distance of over 16 miles from headland to headland. It never has been claimed that under the law of nations such a line could be drawn from headland to headland a greater distance than 10 miles. * * * [*Proceedings of the Alaskan Boundary Tribunal,* S. Doc. No. 162, 58th Cong., 2d Sess., vol. 7, p. 844 (Cong. Doc. Ser. No. 4605).][69]

At the League of Nations Conference for the Codification of International Law, held at the Hague in

[68] S. Doc. No. 162, 58th Cong., 2d Sess. (Cong. Doc. Ser. Nos. 4600–4605).

[69] For a further application of the ten-mile rule to American coasts in this arbitration, see, *infra*, pp. 105–107.

1930, the United States proposed that, subject to historic exceptions, bays and estuaries be recognized as inland waters only where they could be closed by a line not over ten miles long, and only if the relationship of the area of the bay to the width of its entrance were such as to comply with the "Boggs formula" (*supra,* pp. 66–68). *Acts of Conference,* pp. 197–199.[70]

We think it is evident from the foregoing that the United States has always required that "bays," to be recognized as inland waters, be of limited size, and substantially enclosed or "landlocked"; that the size limit on which we originally insisted was six miles; and that the greatest relexation of this limitation to which we had agreed, up to the time of the Submerged Lands Act, was to recognize a width of ten miles. As pointed out above (*supra,* pp. 26–30), our subsequent adoption of the 24-mile rule, by ratification in 1961 of the Convention on the Territorial Sea and the Contiguous Zone, cannot affect the extent of the submerged land granted to California by the Submerged Lands Act in 1953.

While the United States has always contended that a bay must be more than a mere curvature or slight indentation of the coast, it never claimed that international law had established any particular mathe-

[70] The Report of the Second Sub-Committee (see Amended Exceptions of the United States, p. 11) adopted the ten-mile rule, which it said most delegations agreed to, "provided a system were simultaneously adopted under which slight indentations would not be treated as bays." It set out the American and French proposals for such a system, but expressed no opinion on them. *Acts of Conference,* 217–219.

matical formula by which an indentation must be tested. However, our proposal of the "Boggs formula" in 1930 can be taken as indicative, at least in a general way, of what we have understood was required; and the subsequent inclusion of the semicircle test, which reflects substantially the same concept, in the Convention on the Territorial Sea and the Contiguous Zone, shows its general acceptance by other nations. Just as we suggested to the Special Master that the "Boggs formula" was an appropriate technique for giving precision to the general concept of what is "landlocked," so we now suggest that the semicircle test is an equally appropriate technique for that purpose. We believe it may properly be used here even though it was not definitively adopted as part of the policy of the United States until after passage of the Submerged Lands Act. The concept to which it seeks to give precision had been part of our policy from the beginning. In any event, we know of no California bay less than ten miles wide that would have a different status under the semicircle test than under the "Boggs formula." See Report of Special Master (under Order of December 3, 1951), pp. 25–26.

(3) *The Materials Cited by California Do Not Refute the State Department Statement*

(a) *General expresions.*—California refers to various occasions when American officials have spoken in rather general terms of waters that are "landlocked" as being subject to national jurisdiction; and it concludes that the use of generalizations of this sort disproves American adherence to any more precise stand-

ards (Brief, 50, 54, 74, 77, 82–83). That conclusion is unjustified. Many of the statements referred to were made in early years, before precise standards had been evolved, and they have no tendency to detract from the force of subsequent developments. Indeed, such developments were specifically anticipated in one of the documents California cites. Secretary of State Timothy Pickering, writing on July 15, 1797, to Charles Cotesworth Pinckney, John Marshall and Elbridge Gerry, American Plenipotentiaries in France, said (*American State Papers*, 2 Foreign Relations, 153, 157 [71]):

> It will also be expedient to agree on the extent of territorial jurisdiction on the seacoast, and in what situations bays and sounds may be said to be land-locked, and within the jurisdiction of the sovereign of the adjacent country.

Plainly, such a statement does not disprove the development of precise standards in the course of the ensuing century and a half.

The occasional, more recent use of such general expressions has no greater tendency to prove the absence of detailed standards. It is often sufficient, and more convenient, to use a short generalization rather than to describe at length the precise limits of the idea it represents. This is well illustrated by this Court's opinion in *Cunard S. S. Co.* v. *Mellon*, 262 U.S. 100, 122, cited by California (Brief, 74). The case pre-

[71] California's citation for this passage is 5 *British and Foreign State Papers* 17, 28 (1837). Calif. Brief, 50. The letter also appears in S. Doc. 102, 19th Cong., 1st Sess., pp. 453, 463 (Cong. Doc. Ser. No. 129).

sented only abstract questions of statutory construction: whether the National Prohibition Act applied to foreign vessels in American waters and to American vesesls on the high seas. The status of any particular water area was not in issue, and a gratuitous disquisition on that subject would have been wholly inappropriate.[12] Other examples cited by California are of the same sort. The letter of June 16, 1909, from Assistant Secretary of State Huntington Wilson to Mr. F. M. Wilmot, Manager of the Carnegie Hero Fund Commission (Calif. Brief, 74), was for the purpose of stating the width of the marginal belt claimed by the United States. The reference to bays was no more than a caveat that the three-mile rule was inapplicable to them. This clearly appears from the full text of the letter, 99 Cong. Rec. 3622–3623.[13] Similarly, it must be observed that the United States Memorandum of January 6, 1950, *Yearbook of the International Law Commission,* 1950, Pt. 2, p. 61, which California quotes (Brief, 82–83), was a memorandum

[12] Cf. the opinion and decree in the present case, which define the rights of the parties in terms of "inland waters" without identifying those waters.

[13] "I have to acknowledge the receipt of your letter of the 8th instant, wherein, for the information of your Commission in determining what distance from shore acts performed at sea may properly be considered as within the waters of the United States, you inquire as to the extent of the maritime jurisdiction of the United States.

"In reply you are advised that this Government has always adhered to the principle that its maritime jurisdiction extends for a distance of 1 marine league (or nearly 3½ English miles) from its coasts. This, of course, does not include any waters or bays which are so landlocked as to be, without question, only in the jurisdiction of the United States."

on the regime of the *high seas*. The actual problem of defining the baseline of the marginal sea was dealt with not in the Convention on the High Seas but in the Convention on the Territorial Sea and the Contiguous Zone. 106 Cong. Rec. 11174–11175.

California also quotes (Brief, 77), from a letter of March 16, 1927, from Under Secretary of State Joseph C. Grew to the Chairman of the International Fisheries Commission, which California apparently construes as meaning that any bay would be regarded as inland water if its entrance could be commanded by coast batteries. That interpretation is unwarranted. The letter was written in response to an inquiry as to whether the State Department considered the Gulf of California to be high seas. Mr. Grew replied that there seemed to be no direct authority concerning that particular body of water, and that in the absence of generally (*i.e., internationally*) accepted standards it was often hard to say whether a particular bay was territorial. However, since all authorities agreed at least that a bay whose entrance could *not* be commanded by coast batteries was *not* territorial, and since the Gulf of California was 103 miles wide at its southern end and 47 miles wide at its narrowest point, "the width of the Gulf leaves little doubt that it should be regarded as a part of the open sea * * *." 1 Hackworth, *Digest of International Law* (1940), 708. As a matter of elementary logic, the mere premise that a gulf *not* susceptible of being commanded by coast batteries is *not* territorial could not possibly justify a conclusion that all other gulfs *are* territorial; and it is

very clear that Mr. Grew's letter carried no such implication. He was answering a specific question as to the Gulf of California; his reply was, in effect, that no one has ever proposed a rule that would include it in territorial waters. He was not required to say more, and did not. However, even if he had concluded that the uncertain state of the international law would not permit the United States to resist a Mexican claim to any gulf whose entrance could be commanded by coast batteries, it would by no means have followed that the United States was itself asserting similar claims on its own coasts. The letter has no tendency whatever to refute the State Department's statement of the position of the United States.

Similarly, the statement in the State Department's letter of November 13, 1951 (Appendix "A", *infra*, p. 6a; Calif. Brief, pp. 83–84), that the Department "has been and is guided by generally accepted principles of international law and by the practice of other states in the matter," means that its policy has been to claim and recognize only such inland waters as are accorded that status by generally accepted principles and practice. It does not at all mean that our policy has been to claim everything not denied to us by equally well-settled rules.[14] As the State Department's letter of February 12, 1952, clearly pointed out (Appendix "A", *infra*, p. 11a), we would adhere

[14] As pointed out *supra*, pp. 50–51, the United States has made freedom of the seas a basic principle of its international policy and consistently sought to hold to a minimum the extent to which coastal nations can subject bordering waters to their own jurisdiction. As part of this policy, it has necessarily exercised restraint in claiming inland waters.

to our policy of self-restraint where it was not inconsistent with the principles of international law even though not required by them. American adherence to a policy of making only narrow claims is in no way refuted by the fact that international law might have permitted broader ones in some respects.

The State Department's letter of July 13, 1929, to the Norwegian Legation, 1 Hackworth, *Digest of International Law* (1940) 644–645 (Calif. Brief, 77–78), is irrelevant. It said only that the United States had not determined the "geographic points" for drawing the baseline of its marginal sea. Of course this does not mean that it had not adopted principles by which those points could be determined, as occasion arose to do so in any particular locality.

California says (Brief, 83) that the Senate committee that considered the Submerged Lands Act "seriously questioned" whether the ten-mile rule and the "Boggs formula" were or should be the policy of the United States, citing S. Rept. No. 133, 83d Cong., 1st Sess., p. 18. What actually happened was that, as introduced, section 2(c) of the Act, defining "coast line" as including the "line marking the seaward limit of inland waters," included after the words "inland waters" the phrase, "which include all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea." In reporting the bill, the committee deleted that phrase, with the explanation (*ibid.*) that it was done—

because of the committee's belief that the question of what constitutes inland waters should be left where Congress finds it. The committee is convinced that the definition neither adds nor takes away anything a State may have now in the way of a coast and the lands underneath waters behind it.

In this connection, however, the committee states categorically that the deletion of the quoted language in no way constitutes an indication that the so-called "Boggs Formula," the rule limiting bays to areas whose headlands are not more than 10 miles apart, or the artificial "arcs of circles" method is or should be the policy of the United States in delimiting inland waters or defining coastlines. The elimination of the language, in the committee's opinion, is consistent with the philosophy of the Holland bill to place the States in the position in which both they and the Federal Government thought they were for more than a century and a half, and not to create any situations with respect thereto.

When Senator Long, referring to this in the course of the Senate debate, said (99 Cong. Rec. 2633) that the committee thereby "made clear that it does not believe that either the United States Government or a State government is bound by the so-called Boggs formula," Senator Cordon, in charge of the bill, immediately corrected him, saying:

The committee, as I recall, and I think I am correct, neither accepted nor rejected the Boggs formula or any other formula.

He then read the second paragraph quoted above from the committee report, and added—

> That is a clear statement of the views of the committee, and I say to the Senator that as those views were expressed in committee, they are expressed in the report.

The committee report and this exchange make it quite clear that the committee was doing nothing more than disclaiming any intent to pass on what the policy of the United States on this subject was or should be.[75] It preferred to leave the question entirely unaffected by any action of the committee or by the Submerged Lands Act. Such a hands-off attitude cannot fairly be said to indicate any view on the merits of the question.

California is also mistaken in saying (Brief, 84) that the United States conceded that it had not adopted criteria for establishing the baselines for the marginal sea, citing the Report of the Special Master of May 22, 1951, pp. 8 and 34. The only concession that we have made, or that the Special Master attributed to us, was to recognize that the criteria to which we have long adhered and for which we now contend have not all achieved general recognition among nations as obligatory rules of international law.

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[75] The committee was informed of the criteria followed by the State Department, both through the testimony of Jack B. Tate, Deputy Legal Adviser (Hearings on S.J. Res. 13, Senate Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., 1052), and through the letters of November 13, 1951, and February 12, 1952, relied on by the United States in the present case (*id.*, 460–462).

(b) *Particular bodies of water.*—To support its assertion that the United States has not always adhered to the ten-mile limit for bays, California points to various bodies of water with wider entrances, which it says that the United States has claimed or recognized, or might claim, as inland waters. Brief, 33–34, 73–82, 108. It would of course be persuasive if California could show that the United States had claimed or recognized such bays as inland waters under general principles of international law or national policy; but such is not the case. On examination of the examples cited by California, it will be found that the United States either did not recognize them as inland waters, or did not recognize them to the distance suggested by California, or recognized them only upon historic grounds. It has always been understood that, at least in some circumstances, historic usage can give the status of inland waters to bodies of water that do not meet the usual geographical criteria.[76] Thus, California's examples in fact prove nothing as to the ten-mile rule recognized by the United States.

California refers (Brief, 75) to the fact that the Treaty of July 20, 1912, between the United States and Great Britain, 37 Stat. (Pt. 2) 1634, "provided for numerous exceptions" to the ten-mile rule. However, as we have previously shown (*supra*, pp. 76–78), the purpose of that treaty was to identify the bays from which American fishermen were excluded by the Treaty of October 20, 1818, 8 Stat. 248. Since the

[76] See *infra*, p. 141.

Arbitration Tribunal had specifically ruled in 1910 that the "bays" referred to in the 1818 treaty were not limited, as the United States contended, to those over which Great Britain had territorial sovereignty,[77] the 1912 treaty identifying the "bays" referred to in the 1818 treaty has nothing whatever to do with territorial sovereignty or the limits of inland waters.

California quotes (Brief, 81–82) a statement from 1 Hyde, *International Law* (2d ed. 1945) 473, enumerating various indentations in the Alaskan coast, which Professor Hyde suggested the United States could claim. This obviously falls far short of showing that the United States has actually claimed them, and in fact it has not.[78] In the same passage, Professor Hyde said that the outer reaches of Penobscot

[77] California's statement (Brief, 58) that "This decision makes it clear that in 1818 the jurisdiction of a State over all its bays was beyond question, and that the term 'bay' was then understood in its broadest geographical sense" misconstrues the point of the holding, which was that the treaty should be construed as using "bays" in a broad geographical sense because it was *not* limited to those subject to British jurisdiction.

[78] One of the indentations mentioned by Professor Hyde was "Bristol Bay (inside of a line drawn from Igagik [Igegik] to Protection Point." Bristol Bay was the body of water involved in the case of *Arctic Maid Fisheries* v. *State of Alaska*, No. 316 in the Supreme Court of Alaska, and the United States filed an *amicus curiae* brief in that case (cited in California's Brief, p. 86, n. 40) for the specific purpose of disclaiming any jurisdiction over Bristol Bay beyond the usual three-mile limit and ten-mile rule for indentations. In that brief we devoted 60 pages to a detailed review of the United States administration of Alaska, demonstrating that no greater claim had been asserted in Bristol Bay. We consider it unnecessary to go into

Bay, in Maine, between certain named islands "are understood to be deemed by the United States to be a part of its territorial waters." However, the only authority cited by Professor Hyde for his "understanding" (*id.* n. 15) was the "line between the high seas and territorial waters" drawn by the United States Tariff Commission in 1930 "for the sole purpose of facilitating the conduct of an investigation under Senate Resolution 314, 71st Congress, 2d Session." [78a] The Tariff Commission did not draw

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that material here, since California has cited nothing purporting to show an actual assertion of jurisdiction by the United States over the area described by Professor Hyde. The *Arctic Maid* case, involving tax liability, was later compromised by the parties, and the question of jurisdictional limits was not adjudicated.

Another Alaskan indentation mentioned by Professor Hyde was Yakutat Bay. In the Alaskan Boundary Arbitration of 1903, the United States specifically disclaimed a closing line longer than ten miles at Yakutat Bay. See *infra*, p. 107. The United States is now engaged in litigation with the State of Alaska for the purpose of establishing that when Alaska entered the Union in 1959, the territorial claim of the United States at Yakutat Bay was limited to the usual ten-mile rule. *United States* v. *State of Alaska*, Civ. No. A–51–63, U.S. Dist. Ct., Dist. of Alaska. Cook Inlet, also mentioned by Professor Hyde, is likewise in dispute; that question is being held in abeyance, pending decision of the *Yakutat Bay* case. Clearly, California cannot prove one disputed claim by pointing to another.

[78a] Each of the Tariff Commission charts bore the legend, "The line between the high seas and territorial waters shown on this chart in red was drawn by the United States Tariff Commission for the sole purpose of facilitating the conduct of an investigation under Senate Resolution 314, 71st Congress, 2d Session, and is not to be regarded as having official sanction or significance for any other purpose." See Charts Nos. 5102, 5202, 5302, 5402, and 5602, covering the coast of

straight lines between the islands named by Professor Hyde, but delimited the territorial waters by three-mile arcs measured from those islands and from other rocks in the vicinity, except between Seal Island and Isle Au Haut, where the opening is less than ten miles. Obviously, the State Department's formal statement of what it has done, supported by the historical material we have cited above, is not to be impeached by Professor Hyde's opinion as to what the United States *might* do, or by his "understanding" of what it has done, particularly when that understanding is contrary to the only authority he cites to justify it. Moreover, even taking Professor Hyde's statement at face value, it could not help California, for it says only that the waters referred to are understood to be "territorial."[79] California's claim (to the extent that it goes beyond what the United States concedes) depends on establishing that such waters are *inland.* See *supra,* pp. 23–26.

California refers (Brief, 73; 108, n. 62) to the Treaty of June 15, 1846, between the United States and Great Britain, which defined the boundary between the United States and Canada as running "through the middle * * * of Fuca's Straits, to the Pacific Ocean," 9 Stat. 869, and points out that the

California, filed with the Special Master as Attachments 4(a), 4(b) and 4(c) to the Memorandum of the United States in Response to Request of Special Master of June 29, 1949 (dated August 12, 1949).

[79] The use of this word can have been no mere inadvertence, both because the distinction between territorial and inland waters is too significant and because the Tariff Commission map on which Professor Hyde relied was a delimitation of the territorial sea and was clearly so marked.

Strait of Juan de Fuca is 12½ miles wide at its entrance. It is, however, by no means clear that the United States has regarded this as an international claim to the strait. Compare, for example, the statement made by Mr. Peirce, the American delegate at the Whaling and Sealing Arbitration between the United States and Russia in 1902 (*Foreign Relations of the United States,* 1902, Appendix I, p. 440):

> * * * in accordance with the authority which I have received from the Secretary of State of the United States, dated July 3, 1902, I repeat that the Government of the United States claims, neither in Bering Sea nor in its other bordering waters, an extent of jurisdiction greater than a marine league from its shores, but bases its claims to jurisdiction upon the following principle: The Government of the United States claims and admits the jurisdiction of any State over its territorial waters only to the extent of a marine league, *unless a different rule is fixed by treaty between two States; even then the treaty States alone are affected by the agreement.* [Emphasis added.]

California refers (Brief, 73–74; 108, n. 62) to American recognition that Cuba's three-mile belt should be measured from its offshore keys and islands, and attempts to show that very long lines can be drawn between some of those islands and the main Cuban coast. The first reference to this subject was in a letter of August 10, 1863, from Secretary of State William H. Seward to Gabriel Tassara, the Spanish Minister, 1 Moore, *Digest of International Law* (1906), 711–712. Spain had argued that she

was entitled to more than three miles of territorial water around Cuba because the presence of many offshore reefs and islands within three miles of the Cuban coast made a three-mile belt an inadequate defensive area. Secretary Seward made the obvious reply, that the three-mile belt should be measured from the offshore islands rather than from the shore of Cuba proper. This in itself was enough to answer the Spanish contention, and of course was plainly correct. We have always conceded that every island is entitled to a three-mile belt around it. However, Secretary Seward went on to express the view, based on his examination of maps, that the "line of keys is properly to be regarded as the exterior coast line, and that the inland jurisdiction ceases there, while the maritime jurisdiction of Spain begins from the exterior sea front of those keys." Undoubtedly that is true of most of the Cuban keys, especially those closely grouped along the north coast where the principal difficulties with American shipping were arising. Whether Secretary Seward's statement must necessarily be understood as a categorical assertion that *every* islet off the Cuban coast forms part of a single exterior coast line seems doubtful;[80] but even if it is so understood, it is by no

[80] Secretary of State Hamilton Fish, writing on May 18, 1869, to Secretary of the Navy Adolph E. Borie, referred only to the three-mile belt around each key, without suggesting that the line of keys marked the limit of inland waters (1 Moore, *Digest of International Law* (1906) 713):

"The maritime jurisdiction of Spain may be acknowledged to extend not only to a marine league beyond the coast of Cuba itself, but also to the same distance from the coast line of the

means necessary to join them by such long closing lines as California indicates.[81] Of seventeen lines, one exceeds the ten-mile limit by 7/16 miles. So small a concession to a foreign power, in the particular geographical situation there presented, may be dismissed as *de minimis*. Certainly it does not prove a policy of claiming on our own coasts the very long lines suggested by California.[82]

California refers (Brief, 76; 108, n. 62) to the line described by the United States in the Alaska Boundary Arbitration of 1903 as the "coast line" of the Alaska Archipelago, and shows on a map that lines longer than ten miles can be drawn between islands of

> several islets or keys with which Cuba itself is surrounded. Any acts of Spanish authority within that line can not be called into question, provided they shall not be at variance with law or treaties."

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[81] According to Naval Hydrographic Charts Nos. 2617, 2618 and 2620, the Gulf of Batabano, for which California shows closing lines of 23 miles at the east end and 59 miles at the west (Brief opposite p. 74), can be enclosed by the following lines: Punta Oriental to Cayo Piedras, 7 miles; thence to an unnamed sandy islet at about 21°48′30″ N., 81°12′15″ W., 10 miles; thence to Cayos de Dios, 10 miles; thence to Cayo Ingles, 4½ miles; thence to Cayo Largo, 7 miles; thence to Cayo Estofa, 2 miles; thence to Cayo Rosario, 7 miles; thence to Cayo Cantiles, 1½ miles; thence to Cayo Avalos, 3 miles; thence to Cayos Aguardientas, 2 miles; thence to Cayo Campos, ½ mile; thence to Cayo Hicacos, ½ mile; thence to Cayo Matias, 2 miles; thence to the Isle of Pines, 4 miles; thence to Cayos los Indios, 5 miles; thence to Cayos de San Felipe, 8 miles; thence to Punta Santo Domingo, 10 7/16 miles.

[82] The question of how maritime limits should be drawn where there are offshore islands is discussed *infra*, pp. 119–140. The present discussion is not intended to deal with that question beyond showing that the United States has not exceeded the ten-mile rule in that connection.

that group. However, those lines are not the lines described by the United States in that arbitration."[83]

None of the closing lines actually described needs to exceed ten miles in length, and the United States repeatedly emphasized that none was to be drawn so as to be more than ten miles:

> When "measured in a straight line from headland to headland" at their entrances, Chatham Strait, Cross Sound, Sumner Strait and Clarence Strait, by which this exterior coast line is pierced, measure less than ten miles. That fact, according to the authorities quoted in the British Counter Case, pp. 24–28, places them within the category of territorial waters. [5 *Proceedings of the Alaskan Boundary Tribunal,* S. Doc. No. 162, 58th Cong., 2d Sess. (Cong. Doc. Ser. No. 4603), Pt. I, Argument of the United States, pp. 15–16.]
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> But for the purposes of international law, instead of following all the convolutions and

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[83] The line claimed by the United States was described as follows (4 *Proceedings of the Alaskan Boundary Tribunal,* S. Doc. No. 162, 58th Cong., 2d Sess. (Cong. Doc. Ser. No. 4602), Pt. I, Counter Case of the United States, p. 32):

"In the present instance the political or legal coast line drawn southward from Cape Spencer would cross to the northwestern shore of Chichagof Island and follow down the western side of that island and of Baranof Island to Cape Ommaney; at this point it would turn northward for a short distance and then cross Chatham Strait to the western shore of Kuiu Island; thence again turning southward along that shore and along the outlying islets west of Prince of Wales Island, the line would round Cape Muzon and proceed eastward to Cape Chacon; thence following northward along the eastern shore of Prince of Wales Island to Clarence Strait it would cross the latter at its entrance and proceed southeastward to the parallel of 54°40′ at the point where it enters Portland Canal."

> sinuosities of the coast, it is permitted to go across the heads of bays and inlets, and it is in that particular that the rule of international law comes in as to the width of bays and inlets, either 6 or 10 miles. We are not encumbered with that question, because the British Case contends that they must be 10 miles, and we do not dispute it, and these outside inlets are 10 miles. [*Id.*, vol 7 (Cong. Doc. Ser. No. 4605), Argument of Hannis Taylor (for the United States), p. 611.]
>
> This line [proposed by Great Britain] crosses the Yakutat Bay a distance of over 16 miles from headland to headland. It never has been claimed that under the law of nations such a line could be drawn from headland to headland a greater distance than 10 miles. [*Id.*, vol. 7 (Cong. Doc. Ser. No. 4605), Argument of Jacob M. Dickinson (for the United States), p. 844.]

Since the line described can be drawn without crossings more than ten miles long, and the United States emphasized that it was so drawn, there is no justification for California's assumption that the United States was claiming longer lines.

A similar fallacy is involved in California's reference (Brief, 108, n. 62) to the fact that by the Act of February 26, 1881, 21 Stat. 351, Congress approved an agreement between New York and Connecticut, establishing the boundary between those States in Long Island Sound. California accompanies this with a map showing that a line from Montauk Point, on Long Island, to Watch Hill Point, Rhode Island, is 14 miles long (Brief, opposite p. 108), implying that Congress approved that as a closing line. The implica-

tion is unjustified. The line shown on California's map is not in Long Island Sound at all and therefore has no bearing upon what waters Congress was recognizing as inland waters. The line on the map crosses Block Island Sound, a distinct body of water.[84] Long Island Sound is bounded on the east by Orient Point (the north headland of Gardiner Bay) on Long Island, and by Plum Island, Great Gull Island, Little Gull Island, and Fishers Island,[85] stretching diagonally in a northeasterly direction toward Watch Hill Point. The widest opening in that chain is four miles, where The Race passes between Little Gull Island and Fishers Island. See U.S. Coast and Geodetic Survey Chart No. 1211.[86] The triangular area north of Fishers Island, extending eastward to Little Narragansett Bay, is separately designated Fishers Island Sound. See U.S. Coast and Geodetic Survey Chart No. 1211. The boundary line approved by Congress ran at its eastern end into Fishers Island Sound, 1,000 feet north of the North Dumpling Lighthouse, which is to say, about the center of the entrance to Fishers Island Sound, and continued "so far as said States are coterminus" (sic, 21 Stat. 351). Clearly, congressional approval of that line to and through Fishers Island

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[84] The map opposite p. 52 of California's brief correctly identifies this area as Block Island Sound.

[85] Fishers Island is the narrow, unidentified island lying just west of the north end of the 14-mile line shown on the map opposite p. 108 of California's brief.

[86] In *Mahler* v. *Norwich and New York Transportation Company*, 35 N.Y. 352, 355, the court pointed out that Long Island Sound had no opening to the ocean between headlands more than five miles apart.

Sound had nothing whatever to do with the 14-mile line drawn by California across Block Island Sound.

California refers (Brief, 74 n. 35; 108 fn. 62) to Attorney General Edmund Randolph's opinion of May 14, 1793, in the matter of *The Grange,* 1 Ops. A.G. 32, holding Delaware Bay to be within the territory of the United States.[87] The entrance to that bay between Cape May and Cape Henlopen is about ten miles (see U.S. Coast and Geodetic Survey Chart No. 1109). Attorney General Randolph rested his conclusion on historic grounds, coupled with various geographical considerations supporting the reasonableness of that historic claim. Thus, he pointed out (1 Ops. A.G. at 33)—

> That, from the establishment of the British provinces on the banks of the Delaware to the American revolution, it was deemed the peculiar navigation of the British empire.

Again (*id.,* p. 37), he emphasized that "under the former and present governments, the exclusive jurisdiction has been asserted." He then went on (*ibid.*) to point out that the waters within the capes were included in customs districts by the first collection law of the United States, passed in 1789 (1 Stat. 29, 32). Delaware and Chesapeake Bays have become the classic examples of waters claimed by the United States on historic grounds. See, *e.g., Historic Bays* (U.N. Doc. A/CONF. 13/1), printed in *United Nations Conference on the Law of the Sea; Official*

[87] By an apparent typographical error, California's footnote 62 quotes the Attorney General's opinion as saying "areas" of the sea. This should, of course, be "arms" of the sea, giving a more restrictive significance to the passage.

Records, Vol. 1, Preparatory Documents (U.N. Doc. A/CONF. 13/37), 4–6.

It has long been agreed that waters claimed on historic grounds are not subject to general geographic criteria. See, *e.g.,* Basis of Discussion No. 8 for the 1930 League of Nations Conference for the Codification of International Law, *Bases of Discussion,* p. 45; Art. 7, Par. 6, Convention on the Territorial Sea and the Contiguous Zone, 106 Cong. Rec. 11174. This was pointed out in the State Department letter of November 13, 1951 (Appendix "A", *infra,* p. 11a), as the Special Master noted in his Report, pp. 11–12. California has expressed its agreement with this principle. Brief, 103–104. Thus it is clear that the United States' adherence to the ten-mile limit as a general principle is in no way impeached by its claim or recognition of larger bays as historic exceptions.

California attempts to analogize the Santa Barbara Channel to Chandeleur and Breton Sounds, in Louisiana, which the United States has recognized as inland waters (Brief, 33–34, n. 14; 82; 106–108). For present purposes, it is enough to observe that the widest entrances into Chandeleur and Breton Sounds are six miles, between Breton Island and Bird Island, and slightly less than ten miles, between Ship Island and the northernmost tip of the Chandeleur Islands. See U.S. Coast & Geodetic Survey Chart No. 1115. Thus, our concession as to Chandeleur and Breton Sounds involved no breach of the ten-mile limit. Other aspects of California's analogy are discussed *infra,* pp. 153–155.

It thus is evident that in none of the foregoing instances invoked by California did the United States recognize a general legal principle allowing entrances wider than ten miles for bodies of inland waters not claimed on historic grounds.

California also relies on the fact that in 1939, in the case of *People* v. *Stralla,* 14 Cal. 2d 617, 96 P. 2d 941, the United States filed an *amicus curiae* brief taking the position that Santa Monica Bay, between Point Vicente and Point Dume, was inland waters. Calif. Brief, 80–81. It is true that the United States Attorney for the Southern District of California, with prior authorization by the Department of Justice, did file such a brief (*sub nom. People* v. *Adams,* reprinted in the Brief for the State of California in the Proceedings Before the Special Master, as Appendix 3, pp. 6–22). In it he took the position that a bay need not be landlocked or of any particular size or shape, and that Santa Monica Bay had always been known as a "bay" and had been subjected to the jurisdiction of California, and had thereby attained the historic status of a bay. While the filing of that brief was, of course, an action of the United States, we submit that no great significance can be attached to it. The correspondence between the United States Attorney and the Department of Justice (reprinted in the Reply Brief for the United States before the Special Master, pp. 84–87) indicates that he merely sought and received permission "to appear in this case, and assist in the determination of the jurisdictional question involved." The position he was to take was not particularized by him or by the Depart-

ment, and the files of the Department do not indicate that his brief was ever submitted to it for approval, or that the State Department was ever consulted."[88] In those circumstances, the taking of a position so plainly at variance with that uniformly insisted on by the Department of State can only be viewed as an unfortunate aberration. The Court's statement in its opinion in the present case, though made with reference to situations where federal officials had claimed too little, is equally applicable here where one claimed too much (*United States* v. *California*, 332 U.S. 19, 39–40):

> And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

So here, a United States Attorney, who has no power to determine the international policy of the United States, cannot be held to have nullified, by his conduct,

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[88] See Brief for the United States before the Special Master, p. 132; Reply Brief for the United States before the Special Master, p. 18.

the policies long and tenaciously developed and maintained by the Department of State.[89]

(c) *Judicial decisions.*—California also refers to certain judicial decisions that are said to show departures by the United States from the position stated by the State Department. The first (Calif. Brief, 79) is *United States* v. *Carrillo,* 13 F. Supp. 121 (S.D. Cal.), a prosecution for offenses committed on a vessel moored off the coast of California, landward of a line between Point Fermin and Point Lasuen.[90] Two counts, under statutes relating to offenses on the high seas or within the admiralty and maritime

[89] There is precedent for the disavowal of maritime claims which had been asserted even in a much more authoritative way. By the Treaty of March 18/30, 1867, 15 Stat. 539, Russia ceded to the United States all its territory and dominion "on the continent of America and in the adjacent islands" within defined limits, including a line through Bering Sea as the western limit. Congress thereafter forbade the killing of fur-bearing animals within "the dominion of the United States in the waters of Behring Sea" without delimiting that dominion. Act of March 2, 1889, 25 Stat. 1009. As appears from this Court's opinion in *In re Cooper*, 143 U.S. 472, the Treasury Department enforced that Act on the assumption that it applied to all the waters of Bering Sea east of the demarcation line. Nevertheless, the United States formally disavowed any claim in Bering Sea beyond the usual three-mile limit, both in the Fur Seal Arbitration with Great Britain in 1893 and in the Whaling and Sealing Arbitration with Russia in 1902. 12 *Fur Seal Arbitration. Proceedings of the Tribunal of Arbitration at Paris, 1893*, Oral Argument for the United States, 107-110; *Foreign Relations of the United States*, 1902, Appendix I, 440 (*supra*, p. 103).

[90] The proper identification of "Point Lasuen" has been disputed in the present case; but the court in the *Carrillo* case specifically identified the point it meant as being the bluffs at Huntington Beach.

jurisdiction of the United States and out of the jurisdiction of any particular State,"[91] were dismissed by the district court on the ground that the situs of the offense was within the limits of California. The court held that the question of the territorial boundary was subject to judicial notice; that "the practice of governments, explorers, geographers, etc." has been to draw the three-mile limit outside the headland-to-headland line of "bays which are not in fact open sea"; that old English and Spanish maps of the Pacific coast appeared to have followed that practice; and that—

> The Constitution of California (Const. Cal. 1849, art. 12) in its boundary description provides that the 3-mile limit shall be followed, and that the bays and harbors along the coast are included. It would seem to follow logically that United States national and California state sovereignty have always been in accord with this rule. * * *

Pointing out that ancient and modern maps and government publications have referred to San Pedro Bay as lying between Point Fermin and Point Lasuen

[91] Piracy on the high seas, 18 U.S.C. (1934 ed.) 481, now sec. 1651; breaking and entering a vessel on the high seas or other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, 18 U.S.C. (1934 ed.) 490, now sec. 2276. Two other counts, one under 18 U.S.C. (1934 ed.) 489, now sec. 1659 (attacking a vessel on the high seas or within the admiralty and maritime jurisdiction of the United States), and the other under 18 U.S.C. (1934 ed.) 88, now sec. 371 (conspiracy to commit any offense against or to defraud the United States), resulted in convictions that were affirmed on appeal *sub nom. Miller* v. *United States*, 88 F. 2d 102 (C.A. 9).

(Huntington Beach), the court concluded that the waters within that line were within the State of California. 13 F. Supp. at 122. California concedes that the Department of Justice opposed that conclusion, but says that it "is binding on the United States and has become part of the Government's official position." Calif. Brief, 79–80.

Certainly the *Carrillo* judgment binds the United States so far as concerns the prosecution of that defendant; but it by no means follows that it has become part of the official position of the United States on the general question of territorial limits.[92] To give it that effect would be to transfer from the Executive to the courts the function of determining national policy on that question, contrary to the settled authorities (*supra*, pp. 36–48). While we agree that the boundary is subject to judicial notice (*supra*, pp. 42–43), we submit that the district court in *Carrillo* erred in informing itself from "the practice of governments, explorers, geographers, etc.," rather than seeking an authoritative statement from the Executive Department charged with making determinations in that field.[93] The fact that an area is called a

[92] California does not seem to feel that its own claims are inhibited by contrary decisions of California courts. See *infra*, pp. 134–135, 177–178.

[93] Cf. *Ross* v. *Himely*, 4 Cranch 241, 272, where Vattel's writings were urged on this Court in support of the contention that Santo Domingo, then in revolt against France, ought to be recognized as independent. The Court declined to consider the question, saying, "But the language of that writer is obviously addressed to sovereigns, not to courts. It is for governments to decide * * *."

"bay" on charts or in other publications has no significance at all in determining whether it is inland water. As Sir Cecil Hurst has said, "No one seems to have considered that waters ceased to be part of the open sea merely because they bore the name of gulf or bay." Hurst, "The Territoriality of Bays," 3 *British Yearbook of International Law* (1922–23), 42, 49. The name "bay" is given to very large areas such as the Bay of Bengal and the Bay of Biscay, which could not possibly be claimed as inland waters.

California cites *People* v. *Stralla,* 14 Cal. 2d 617, 96 P. 2d 941, both because of federal participation in that case as *amicus curiae* (Calif. Brief, 64, 80), and to support California's historic claim to Santa Monica Bay (Calif. Brief, 131, 133, 134, 135). The former aspect is discussed *supra,* pp. 111–113; the matter of historic claims is discussed *infra,* pp. 160–178.

Finally, California cites the *Fisheries Case* (*United Kingdom* v. *Norway*), I.C.J. Reports, 1951, p. 116 (Brief, 84), as a binding determination that international law does not require territorial waters to be restricted so narrowly as described in the State Department letters. However, the historic fact that the United States did restrict itself to narrow limits is not expunged by the International Court's holding in 1951 that such restraint was not required by international law. There is nothing in the decision of the International Court that would *require* a nation to claim broader limits, and by its letter of February 12, 1952 (Appendix "A", *infra,* p. 11a), the State Department made clear that it had decided

to adhere to its former position despite the fact that the *Fisheries Case* had made broader claims permissible.[94] California has offered nothing to show a change of position by the United States following the decision of the *Fisheries Case,* prior to its ratification of the Convention on the territorial Sea and the Contiguous Zone in 1961. As we have shown (*supra,* pp. 26–30), the enlargemnt resulting from ratification of that Convention is irrelevant to California's rights, since those rights depend on the grant made by the Submerged Lands Act in 1953 and are measured by the maritime limits then in effect.[95]

(d) *Legal writings.*—As part of its attempt to show that the United States has not in fact followed the principles described by the State Department, California quotes from the works of various legal writers, including Kent, *Commentaries on American Law* (Brief, 50–53, 58), Wheaton, *Elements of International Law* (Brief, 53, 58), Angell, *Tide Waters* (Brief,

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[94] See, *supra,* p. 62.

[95] Neither, of course, can the State rely on such post-admission events to enlarge its rights under *Pollard* v. *Hagan,* 3 How. 212, independently of the Submerged Lands Act. As this Court said in *United States* v. *Louisiana,* 363 U.S. 1, 35:

"It is sufficient for present purposes to note that there is no question of Congress' power to fix state land and water boundaries as a domestic matter. Such a boundary, fully effective as between Nation and State, undoubtedly circumscribes the extent of navigable *inland* waters and underlying lands owned by the State under the *Pollard* rule. * * *" [Emphasis by the Court.]

The Submerged Lands Act has been the only congressional enlargement of the maritime boundary fixed for California upon its admission to the Union in 1850.

55), and Hyde, *International Law* (Brief, 81–82). We have already commented on some of the passages quoted (*supra,* pp. 63–64, 100–102), and need only observe here that the views of even the most eminent writers as to what the United States might do within the limits of international law cannot replace the factual demonstration of what it has done. The question here is what the United States has done, not what it might do. California has altogther failed to show that the practice of the United States in 1953 and prior thereto departed in any significant way from that described in the State Department letters. See Report of Special Master (under Order of December 3, 1951), 22–23.

d. *Rivers flowing directly into the sea are inland waters whatever their width*

On the subject of river mouths, the State Department letter of November 13, 1951, said (Appendix "A", *infra,* p. 9a):

> (d) With respect to mouths of rivers which do not flow into estuaries, the Second Sub-Committee agreed to take for the base line a line following the general direction of the coast and drawn across the mouth of the river, whatever its width. (*Acts of Conference,* 220).[96]

The Special Master's Report adopted this position (Report, 4), and it has not been questioned by California.

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[96] The final paragraph of the letter made clear that the principles described in the letter represented the position of the United States. See, *infra,* p. 121; Appendix "A", *infra,* p. 11a.

e. *Territorial waters begin at low-water line around islands and within straits that connect areas of high seas*

Since the areas claimed by California as straits are bounded on one or both sides by islands, it will be convenient to consider these two subjects together. In this case, they are two faces of the same coin.

(1) *The State Department's Statement of the Position of the United States*

The State Department letter of November 13, 1951, said (Appendix "A", *infra,* pp. 9a–11a):

> (e) With respect to the measurement of territorial waters when rocks, reefs, mudbanks, sandbanks, islands or groups of islands lie off the coast, the United States took the position at the [1930] Conference that separate bodies of land which were capable of use should be regarded as islands, irrespective of their distance from the mainland, while separate bodies of land, whether or not capable of use, but standing above the level of low tide, should be regarded as islands if they were within three nautical miles of the mainland. Each island, as defined, was to be surrounded by its own belt of territorial waters measured in the same manner as in the case of the mainland (*Acts of Conference,* 200).
>
> The report of the Second Sub-Committee defined an island as a separate body of land, surrounded by water, which was permanently above high water mark, and approved the principle that an island, so defined, had its own belt of territorial sea (*Acts of Conference,* 219). While the Second Sub-Committee declined to define as islands natural appendages of the sea-

bed which were only exposed at low tide, it agreed, nevertheless, that such appendages, provided they were situated within the territorial sea of the mainland, should be taken into account in delimiting territorial waters (*Acts of Conference,* 217).

(f) The problem of delimiting territorial waters may arise with respect to a strait, whether it be a strait between the mainland and offshore islands or between two mainlands. The United States took the position at the Conference that if a strait connected two seas having the character of high seas, and both entrances did not exceed six nautical miles in width, all of the waters of the strait should be considered territorial waters of the coastal state. In the case of openings wider than six miles, the belt of territorial waters should be measured in the ordinary way (*Acts of Conference,* 200–201). The report of the Second Sub-Committee supported this position with the qualification that if the result of this determination of territorial waters left an area of high sea not exceeding two miles in breadth surrounded by territorial sea, this area could be assimilated to the territorial sea (*Acts of Conference,* 220).

The Second Sub-Committee specified in its observations on this subject that the waters of a strait were not to be regarded as inland waters, even if both belts of territorial waters and both shores belonged to the same state (*Acts of Conference,* 220). In this, it supported the policy of the United States to oppose claims to exclusive control of such waters by the nation to which the adjacent shore belonged. (The

Secretary of State, Mr. Evarts, to the American Legation, Santiago, Chile, January 18, 1879, in connection with passage through the Straits of Magellan, I Moore, *Digest of International Law,* 664). With respect to a strait which is merely a channel of communication to an inland sea, however, the United States took the position, with which the Second Sub-Committee agreed, that the rules regarding bays should apply (*Acts of Conference,* 201, 220).

* * * * *

The principles outlined above represent the position of the United States with respect to the criteria properly applicable to the determination of the base line of territorial waters and to the demarcation between territorial waters and inland waters.

(2) *The Historical Materials Support the State Department's Statement*

From very early times, the United States has adhered to the distinction between straits which lead only to inland waters and straits which connect areas of high seas. It has insisted that the latter are not inland waters and, accordingly, must be kept open to international navigation.

(a) *The Strait of Canso.*—Apparently the United States first had occasion to assert the right of free navigation between straits connecting areas of high seas, in regard to the Strait of Canso. This is a narrow passage, about a mile wide and fourteen miles long,[97] between Cape Breton Island and the main-

[97] See *Webster's Geographical Dictionary* (1949), 194.

land of Nova Scotia, and connecting the Atlantic Ocean and the Gulf of St. Lawrence. On July 15, 1839, James Primrose, United States Consul at Pictou, Nova Scotia, wrote to Sir Rupert George, Provincial Secretary (H. Exec. Doc. No. 186, 26th Cong., 1st Session, 15 (Cong. Doc. Ser. No. 366)):

> I most respectfully beg leave to bring under the notice of the Government the existing practice of collecting light-dues at the strait of Canso.
>
> * * * * *
>
> Will you do me the favor of informing me whether the collectors of light-dues at the strait of Canso act under the authority of the Government of this Province, in levying that rate there on American vessels not bound to any port or place within the same?
>
> The imposition of any tax by the Province of Nova Scotia upon American vessels, engaged in the prosecution of the fisheries using that passage *in transitu,* would appear to deprive it of the character of constituting a portion of the high seas.[98]

On November 9, 1839, Sir Rupert George, having brought the inquiry to the attention of the Lieutenant Governor and her Majesty's Council, replied (*id.,* 22–23):

> With respect to the concluding paragraph of your letter of the 15th of July, I have it in command to remark, that his excellency can-

[98] Mr. Primrose forwarded a copy of this letter to Secretary of State John Forsyth, October 10, 1839. H. Exec. Doc. No. 186, *supra,* p. 14.

> not admit the character given to the gut of Canso as a part of the high seas, until recognized by some authoritative decision, as the correctness of its application to that narrow passage lying entirely between the lands of this Province may be questionable, more especially as an open communication around the eastern end of the island of Cape Breton is to be found on the high seas to the Gulf of St. Lawrence, or any other point to which the strait of Canso can be made subservient.[99]

On March 27, 1841, Andrew Stevenson, American Minister to Great Britain, pursuant to instructions of February 20, 1841, from Secretary of State John Forsyth (H. Exec. Doc. No. 120, 32d Cong., 1st Sess., 66, 68 (Cong. Doc. Ser. No. 648)), wrote to Lord Palmerston, British Foreign Secretary (*id.*, 69, 71):

> It may be proper, also, on this occasion, to bring to the notice of her Majesty's government the assertion of the provincial legislature, *"that the Gut or Strait of Canso is a narrow strip of water, completely within and dividing several counties of the province,"* and that the use of it by the vessels and citizens of the United States is in violation of the treaty of 1818. This strait separates Nova Scotia from the island of Cape Breton, which was not annexed to the province until the year 1820. Prior to that, in 1818, Cape Breton was enjoying a government of its own, entirely distinct from Nova Scotia, the strait forming the line of demarcation between them, and being then,

[99] Mr. Primrose forwarded a copy of this letter to Secretary of State John Forsyth, November 18, 1839. *Id.*, 21.

> as now, a thoroughfare for vessels passing into and out of the Gulf of St. Lawrence. The union of the two colonies cannot, therefore, be admitted as vesting in the province the right to close a passage which has been freely and indisputably used by the citizens of the United States since the year 1783. It is impossible moreover, to conceive how the use on the part of the United States of this right of passage, common, it is believed to all other nations, can in any manner conflict with the letter or spirit of the existing treaty stipulations. * * * [Emphasis in original.]

The Colonial Office furnished a copy of that letter to Lord Falkland, Lieutenant Governor of Nova Scotia (see S. Exec. Doc. No. 22, 32d Cong., 2d Sess., 404 (Cong. Doc. Ser. No. 662)), who in turn on April 28, 1841, asked Lord Russell, the Colonial Secretary, for an opinion of the Law Officers of the Crown on certain questions as to American fishing rights and, in his fourth question, their right to navigate the Strait of Canso. *North Atlantic Coast Fisheries Arbitration,* S. Doc. No. 870, 61st Cong., 3d Sess., vol. 3 (Cong. Doc. Ser. No. 5931), 1043–1048. The Law Officers on August 30, 1841, rendered an opinion that the 1818 treaty neither gave nor took away a right to navigate the Strait of Canso, and that no such right existed independently of treaty. *Id.,* 1047, 1048. That report seems never to have been officially transmitted to the United States;[100]

[100] See "Confidential Memorandum for the Use of the Commissioners on the Part of the United States in the American-British Joint High Commission, Washington, 1871," *Foreign Relations of the United States*, 1873, Vol. III, p. 284.

but it was finally sent to Lord Falkland in November 1842 (see Sabine, *Report on the Principal Fisheries of the American Seas,* S. Exec. Doc. No. 22, 32d Cong., 2d Sess., 181, 407 (Cong. Doc. Ser. No. 662)[101]), and in succeeding years the Nova Scotia House of Assembly made repeated efforts to close the Strait of Canso (see *id.,* 431–436). Those efforts were terminated by the Reciprocity Treaty of June 5, 1854, 10 Stat. 1089 (*supra,* p. 78), but seem to have resumed after the United States terminated that treaty on March 17, 1866 (*supra,* p. 78). On October 3, 1870, Mortimer M. Jackson, American consul at Halifax, Nova Scotia, wrote to J. C. B. Davis, Assistant Secretary of State (*Foreign Relations of the United States,* 1870, p. 428, 430):

> It has been intimated that still further restrictions will be imposed upon our fishermen, and that an attempt will be made to exclude them from the Strait of Canso. This appears to me incredible, in view of established principles of international law and the usage which has so long prevailed.

The desire of Congress to maintain the freedom of navigation through the Strait of Canso was one of the reasons for passage of the Act of March 3, 1887, 24 Stat. 475, 46 U.S.C. 143, authorizing the President to take retaliatory action in case of discrimination against American vessels in the waters of British North America. See 18 Cong. Rec. 930.

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[101] Also in H. Exec. Doc. No. 23, 32d Cong., 2d Sess., 181, 407 (Cong. Doc. Ser. No. 676).

The status of the Strait of Canso was not affected by the North Atlantic Coast Fisheries Arbitration of 1910 (*supra,* pp. 85–88). The Treaty of January 27, 1909, 36 Stat. (Pt. 2) 2141, submitting the fisheries question to arbitration, was adopted subject to an express reservation that the question of the right of innocent passage through the Strait of Canso was not to be included in the arbitration, and that the respective views of the parties on that subject were to be in no way prejudiced by the arbitration. 36 Stat. (Pt. 2) at 2146–2147. The Award of the Tribunal noted the same reservation. *North Atlantic Coast Fisheries Arbitration,* S. Doc. No. 870, 61st Cong., 3d Sess., vol. 1 (Cong. Doc. Ser. No. 5929), Award of the Tribunal, p. 98. However, the position of the United States has been clear throughout—that the one-mile wide strait is territorial, not inland, waters open to all traffic under international law.

(b) *The Danish Sound, Great Belt, and Little Belt.*— These are three alternative passages from the Kattegat to the Baltic Sea. The Great Belt passes between the Danish islands of Fyn and Sjaelland, the Little Belt between Fyn and the Danish mainland, and the Sound between Sjaelland and Sweden.[102] It had long been the practice of Denmark to charge tolls for the navigation of these passages, and by the Treaty of April 26, 1826, the United States was given "most favored nation" treatment with respect to such tolls. Art. 5, 8 Stat. 341. However, the United States did not specifically agree to the imposition of these "Sound

[102] See Rand-McNally Commercial Atlas (82d ed. 1951), 536.

dues," and in about 1848 began to resist them. The subject was under frequent discussion between the two countries during the next ten years, though the United States refrained from pressing the matter because of its reluctance to embarrass Denmark during its wars with Prussia. The relevant diplomatic correspondence, reprinted in H. Exec. Doc. No. 108, 33d Cong., 1st Sess., 2–61 (Cong. Doc. Ser. No. 726), includes the following:

Letter of September 8, 1848, from R. P. Flenniken, American Minister to Denmark, to Secretary of State James Buchanan (*id.*, 37–38)—

I would respectfully draw the attention of the department to the question of the Sound dues. I think it not improbable that Germany, in negotiating a permanent treaty of peace with Denmark, will insist upon the abolishment of these dues, which, in my opinion, she would have a very just right to do, for surely this exaction is a most offensive burden upon the commerce of the world, and wholly indefensible upon any principal of international right. I have recently introduced this question twice in my interviews with the Minister of Foreign Affairs, who, with the characteristic frankness of his nature, admits to me that he cannot defend the principle upon which these dues are exacted, but begged me to delay pressing the question until they got rid of their war with Germany. * * *

Letter of October 14, 1848, from the Secretary of State James Buchanan to R. P. Flenniken (*id.*, 38, 39)—

Under the public law of nations, it cannot be pretended that Denmark has any right to levy

duties on vessels passing through the Sound from the North Sea to the Baltic. Under that law, the navigation of the two seas connected with this strait is free to all nations; and therefore the navigation of the channel by which they are connected ought also to be free. In the language employed by Mr. Wheaton, "even if such strait be bounded on both sides by the territory of the same sovereign, and is at the same time so narrow as to be commanded by cannon-shot from both shores, the exclusive territorial jurisdiction of that sovereign over such strait is controlled by the right of other nations to communicate with the seas thus connected." * * *

By letter of November 24, 1848 (*id.*, 45–47), the American Minister transmitted these views to the Danish Foreign Minister as the position of the United States.

Finally, on April 14, 1855, pursuant to a Senate resolution of March 3, 1855, 9 S. Exec. Jour. 430–431, President Pierce gave Denmark notice of termination of the 1826 treaty, which was terminable on a year's notice. In his message to Congress on December 31, 1855, he said of this action:

> I remain of the opinion that the United States ought not to submit to the payment of the Sound dues, not so much because of their amount, which is a secondary matter, but because it is in effect the recognition of the right of Denmark to treat one of the great maritime

> highways of nations as a close sea; and prevent the navigation of it as a privilege, for which tribute may be imposed upon those who have occasion to use it. [H. Exec. Doc. No. 1, 34th Cong., 1st Sess., p. 9 (Cong. Doc. Ser. No. 840).]

Thereafter the Treaty of April 11, 1857, 11 Stat. 719, established complete freedom of navigation for American vessels in the Danish straits.

(c) *Shimonoseki Strait.*—Another episode in which the United States insisted on the right of free navigation in straits connecting areas of high seas concerned the Shimonoseki Strait, between the Japanese islands of Honshu and Kyushu, leading from the Korea Strait to the Inland Sea, which in turn leads to the Pacific Ocean. In 1863 the Prince of Nagato fortified the strait and excluded foreign shipping from it. The American Minister, Mr. Pruyn, joined with representatives of Great Britain, France and the Netherlands, in equipping a task force of gunboats which, in September 1864, entirely destroyed the fortifications of the Prince and reopened the strait. That action of the American Minister was approved by Secretary of State William H. Seward, H. Exec. Doc. No. 1, 38th Cong., 2d Sess., Pt. III, pp. 542, 553 and 596 (Cong. Doc. Ser. No. 1218); H. Exec. Doc. No. 1, 39th Cong., 1st Sess., Pt. III, p. 229 (Cong. Doc. Ser. No. 1246), and was subsequently discussed with approval by the Senate Committee on Foreign Rela-

tions, S. Rept. No. 1683, 49th Cong., 2d Sess., p. V (Cong. Doc. Ser. No. 2456).[103]

(d) *Straits of Magellan.*—On January 18, 1879, Secretary of State William M. Evarts wrote to Thomas O. Osborn, American Minister to Chile and the Argentine Republic, pointing out that the boundary dispute between those countries was jeopardizing the shipping of nations to whom "the Straits of Magellan are a thoroughfare," and saying that "no sufficient reason is seen why either should not be held accountable for any injury which may have been occasioned or may result to vessels and citizens of the United States." *Foreign Relations of the United States,* 1879, pp. 15–16.[104]

(e) *Straits leading to inland waters.*—Wherever the United States has insisted on the right of innocent passage through straits, denying them the status of inland waters, the claim has rested on the character

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[103] Report accompanying S. 3173, 49th Cong., 2d Sess., which became the Act of March 3, 1887, 24 Stat. 475, *supra*, p. 125.

[104] In *The Bangor* [1916], Prob. 181, 185, involving a prize taken in the Straits of Magellan, the court said:

"This strait connects the two vast free oceans of the Atlantic and the Pacific. As such, the strait must be considered free for the commerce of all nations passing between the two oceans.

"In 1879 the Government of the United States of America declared that it would not tolerate exclusive claims by any nation whatsoever to the Strait of Magellan, and would hold responsible any Government that undertook, no matter on what pretext, to lay any impost on its commerce through the strait."

The decision was that the strait, though open to international navigation, was, at the point of capture, assumed to be territorial water of Chile; but that only Chile could complain of the seizure as a violation of its neutrality.

of the strait as a passageway between two areas of high seas. No such right is claimed as to a strait leading only to inland waters. Such a strait is treated as a bay. Examples of this have already been discussed, including the straits leading into the Alaskan Archipelago (*supra,* pp. 105–107), straits leading to waters between Cuba and its encircling reefs and keys (*supra,* pp. 103–105), and Chandeleur Sound (*supra,* p. 110; see also, *infra,* pp. 153–155).[105]

(f) *Islands.*—The State Department has had relatively little occasion to discuss the subject of islands as such, probably because it is universally agreed that each is entitled to its own three-mile belt, and the only serious questions have concerned the status of straits formed by particular islands. However, on May 18, 1869, Secretary of State Hamilton Fish did write to Secretary of the Navy Adolph E. Borie (1 Moore, *Digest of International Law* (1906), 713):

> The maritime jurisdiction of Spain may be acknowledged to extend not only to a marine league beyond the coast of Cuba itself, but also to the same distance from the coast line of the several islets or keys with which Cuba itself is surrounded. * * *

[105] The proper application of this principle becomes a matter of some difficulty in situations where several straits lead to the same body of inland water; and a circularity is involved in situations where the "inland" status of that body depends on whether its entrances are to be subject to the ten-mile rule or to three-mile marginal belts. It may be that some of the applications have been unduly liberal—for example, in the case of Chandeleur Sound—but this need not concern us here, for, as we shall show, even accepting those liberal applications as correct, they do not reach the situation in California. See *infra,* pp. 151–155.

Similarly, Secretary of State Thomas F. Bayard, in his letter of May 28, 1886, to Secretary of the Treasury Daniel Manning (Appendix, "A" *infra,* p. 16a) said:

> We may therefore regard it as settled that, so far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it *follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands* belonging to the continental sovereign. [Emphasis added.]

The purport of his letter, of course, is that our position must necessarily be the same on the Pacific coast. See *supra,* pp. 88–89.

(g) *1930 Conference.*—The position of the United States at the 1930 League of Nations Conference for the Codification of International Law followed exactly the position described above. The United States there recommended (*Acts of Conference,* 200–201):

> The delimitation of territorial waters in straits shall be made in the following manner:
>
> 1. In the absence of agreement to the contrary, when both coasts of a strait which connect two seas having the character of high seas

belong to a single State, and both entrances do not exceed six nautical miles in width, all of the waters of the strait are territorial waters of the coastal State; if both entrances or either one exceeds six nautical miles in width the breadth of the territorial waters is three nautical miles measured from each coast at low tide.

2. In the absence of agreement to the contrary, when two or more States border upon a strait, the territorial waters of each State extend to the middle of the strait in those parts where the width does not exceed six nautical miles; where the strait exceeds six nautical miles in width, the breadth of the territorial waters is three nautical miles, measured from each coast at low tide.

3. In the absence of agreement to the contrary, where a strait is merely a channel of communication with an inland sea, the rules regarding bays apply to such strait.

(h) *Other authorities.*—These actions and expressions by the United States conform to the general consensus of authority. From quite early times, writers have recognized that straits between areas of high seas could not be subjected to the exclusive use of the coastal nations. See, *e.g., Vattel, Le Droit de Gens* (Fenwick's translation of 1758 ed., Classics of International Law, 1916), p. 109; Wheaton, *Elements of International Law* (Classics of International Law, 1936), p. 220; Rayneval, *Droit de la Nature* (3d ed. 1851), pp. 298–299.

Judicial decisions have denied the status of inland waters to straits between the seacoast and offshore islands. *Hamburgh American Steam Navigation Co.*

v. *North of Scotland Banking Company—The "Eclipse" and the "Saxonia,"* 15 Moore P.C., 262, 268, decided in 1861, held that a collision in the Solent, the channel from 2 to 5 miles wide and about 30 miles long between England and the Isle of Wight, occurred on the "high seas," that is, in waters not governed by the Merchant Shipping Act (17 & 18 Vict., c. 104) governing navigation by British vessels. The collision there involved, between a British and a foreign vessel, occurred about half a mile from the Isle of Wight.

The California courts have recognized that each of the islands off the coast of California has its own three-mile belt, and that the waters between them and the mainland are high seas, out of the jurisdiction of the State. *Wilmington T. Co.* v. *Railroad Commission,* 166 Cal. 741, 137 Pac. 1153, affirmed, 236 U.S. 151, while sustaining the authority of the State Railroad Commission to regulate rates between Avalon (on Catalina Island) and San Pedro, pointed out (166 Cal. at 742): "Notwithstanding that the ports are in the same county, a vessel, in passing directly from one to the other, must travel for upward of twenty miles upon the high seas, outside of the territorial jurisdiction of this state." In affirming, this Court made a similar statement (236 U.S. at 152). *Suttori* v. *Peckham,* 48 Cal. App. 88, 191 Pac. 960, involving regulation of fishing in "state waters" around Catalina Island, held that those waters extended three miles from the island. The same question was answered in the same way a few weeks later in *In re Marincovich,* 48 Cal. App. 474, 192 Pac. 156. The

court said that the statute regulating fishing in "state waters" applied to "a belt of water, three miles wide, circling the island" (*i.e.,* Catalina), 48 Cal. App. at 476, and continued (*id.,* 477–478):

> If the extent of California's jurisdiction is to be determined according to the general rule, based upon usage uniformly recognized by the law of nations, there can be no doubt that it includes a zone of water, three miles wide, around Catalina island.
>
> * * * * *
>
> There is just as much reason for the extension of state sovereignty over a three-mile belt around Catalina island as there is for the extension of sovereignty over a three-mile zone along and off the shore of the mainland. * * *

Perhaps the latest, and certainly the most definitive holding on the subject is the decision of the International Court of Justice in the *Corfu Channel Case,* I.C.J. Reports, 1949, p. 4. The court there held, rejecting contentions virtually identical to those being advanced here by California (Brief, pp. 109–113), that the Corfu Channel, between the Greek island of Corfu and the mainland (Greek at one end, Albanian at the other) was subject to a right of international navigation, so that Albania was responsible for damage done by mines to British warships passing through the Albanian portion of the strait. The court said (p. 28):

> It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for

international navigation between two parts of the high seas without previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.

The Albanian Government does not dispute that the North Corfu Channel is a strait in the geographical sense; but it denies that this Channel belongs to the class of international highways through which a right of passage exists, on the grounds that it is only of secondary importance and not even a necessary route between two parts of the high seas, and that it is used almost exclusively for local traffic to and from the ports of Corfu and Saranda.

It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this Strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas. It has nevertheless been a useful route for international maritime traffic. * * * [106]

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[106] For a discussion of the case, with a chart of the area involved, see Hudson, "The Twenty-eighth Year of the World Court," 44 *American Journal of International Law* (1950), 1-12.

California seeks to avoid the force of the *Corfu Channel Case* by quoting at some length from a criticism of it by Eric

Similar principles were stated in the Draft Convention on Territorial Waters, prepared by a group of American jurists and scholars under the auspices of Harvard Law School prior to the 1930 Conference for the Codification of International Law. *Research in International Law,* 23 *American Journal of International Law* (1929, Special Supplement), pp. 243–244.

The Report of the Second Sub-Committee at the 1930 Conference included provisions to the same effect (*Acts of Conference,* 219–220):

ISLANDS

Every island has its own territorial sea. * * *

* * * * *

STRAITS

In straits which form a passage between two parts of the high sea, the limits of the territorial sea shall be ascertained in the same manner as on other parts of the coast, even if the same State is the coastal State of both shores.

* * * * *

PASSAGE OF WARSHIPS THROUGH STRAITS

Under no pretext whatever may the passage even of warships through straits used for inter-

Bruel (Calif. Brief, 110, fn. 67). However, despite Bruel's disapproval, the decision of the International Court of Justice remains an authoritative declaration of the international law on the subject; moreover, its effect has been substantially incorporated into Article 16 of the Convention on the Territorial Sea and the Contiguous Zone (see, *supra,* p. 35), apparently indicating a general international acceptance of it.

733-890—64——11

national navigation between two parts of the high sea be interfered with.

Similar provisions are now embodied in articles 10 and 16 of the Convention on the Territorial Sea and the Contiguous Zone (106 Cong. Rec. 11174–11175).

(3) *The Materials Cited by California Do Not Refute the State Department's Statement*

California argues (Brief, 47) that "the principle that islands may have their own territorial belts, is a completely modern idea which was virtually unknown in 1849," and proceeds to cite early writers who said that sovereignty over a marginal belt also conferred sovereignty over islands therein. From this, California, apparently concludes that, conversely, sovereignty over islands confers sovereignty over the waters between them and the mainland. The argument is a *non sequitur*. The Court has already recognized that statutes and charters such as California mentions (Brief, 48), establishing jurisdiction over all islands within a certain distance of the shore, are not to be understood as thereby including jurisdiction over the waters. *United States* v. *Louisiana,* 363 U.S. 1, 67–69.[107] Moreover, even if

[107] The Court there pointed out that the Treaty of Paris, September 3, 1783, 8 Stat. 80, 82, recognizing American independence, recognized American sovereignty over all islands within tweny leagues of the shore, but that the American claim of a marginal belt, announced ten years later, was of only three miles (one league). Similarly, the act defining the boundaries of Georgia claimed a three-mile marginal belt, but all islands within twenty leagues. The Court concluded that the act admitting Louisiana to the Union in 1812, and giving it all islands within three leagues of the coast, "contemplated no territorial sea whatever." 363 U.S. at 68–69.

California were right in concluding that sovereignty over islands proved the existence of a marginal belt to that distance (though California itself seems to concede otherwise (Brief, 48)), that still would not support its claim. A marginal belt is only territorial water; and, as we have shown (*supra,* pp. 18-26), California's claim depends on establishing that the waters here under discussion are *inland* waters.

California cites the case of *The Anna,* 5 Rob. Adm. 373 (1805), to support its view that the United States had jurisdiction over water intervening between the mouth of the Mississippi River and an offshore islet (Brief, 49). However, the case said nothing about the intervening water; it merely held that the islet belonged to the United States, and that a vessel captured within three miles of it was consequently taken in territorial waters. Thus, the case established that the islet had its own three-mile belt—the precise concept that California says was still "virtually unknown" 44 years later.

The assertion that the idea of a three-mile belt around islands is "a completely modern idea" is further discredited by the letter of Secretary of State Fish to Secretary of the Navy Borie, May 18, 1869, and the letter of Secretary of State Bayard to Secretary of the Treasury Manning, May 28, 1886, already quoted (*supra,* pp. 131–132). As Secretary Bayard there pointed out, it had been from the beginning one of the foundations of the American posi-

tion in the long dispute with Great Britain over the North Atlantic fisheries.[108]

California refers to several episodes as showing departures by the United States from the principles described by the State Department. These concerned the Straits of Juan de Fuca (Brief, 53; 73; 108, fn. 62), the Cuban keys (Brief, 73–74; 108, fn. 62), the Alaska Archipelago (Brief, 76; 108, fn. 62), other parts of the coasts of Alaska and Maine (Brief, 81–82), Long Island Sound (Brief, 108, fn. 62), and Chandeleur, Breton and Mississippi Sounds (Brief, 33–34, fn. 14; 82; 108, fn. 62). As we have already indicated *supra,* pp. 100–110), none of the episodes mentioned impeaches the State Department's statement in any respect.

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[108] An earlier application of the same principle by Russia occurred in 1853, when the Russian government, after rejecting, as unjustified under international law, pleas by the Russian-American Company to close large areas of the North Pacific Ocean to foreigners, did issue orders to the navy "to see that no whalers entered the bays or gulfs, or came within 3 Italian miles of our shores, that is, the shores of Russian America (north of 54°41′), the Peninsula of Kamtchatka, Siberia, the Kadjak Archipelago, the Aleutian Islands, the Pribyloff and Commander Islands, and the others in Behring Sea, the Kuriles, Sakhalin, the Shantar Islands, and others in the Sea of Okhotsk to the north of 46°30′ north." This account of the order, which was issued December 9, 1853, appears in Tikhmenieff, *Historical Review of the Formation of the Russian-American Company, and Their Proceedings up to the Present Time* (1863), Pt. II, pp. 130–139, as translated in 4 *Fur Seal Arbitration,* Appendix to the Case of Great Britain, Vol. I, p. 265, 268 (*40, *41–42).

f. Waters over which the national government has historically exercised jurisdiction as inland waters are not subject to the foregoing geographical principles

The State Department letter of November 13, 1951, said (Appendix "A", *infra*, p. 11a).

> In connection with the principles applicable to bays and straits, it should be noted that they have no application with respect to the waters of bays, straits, or sounds, when a state can prove by historical usage that such waters have been traditionally subjected to its exclusive authority. The United States specifically reserved this type of case at the Hague Conference of 1930 (*Acts of Conference*, 197).

It has been widely recognized that general geographical criteria are not applicable to waters over which a nation has established its jurisdiction by historic usage. Cf. Convention on the Territorial Sea and the Contiguous Zone, Article 7, Paragraph 6, 106 Cong. Rec. 11174. California agrees (Brief, 103–104); consequently there is no need to elaborate the point. Our differences concern the question of what waters are to be considered "historic waters" within this principle, and will be discussed below (*infra*, pp. 160–178).

4. THE SPECIAL MASTER CORRECTLY RULED THAT NONE OF THE DISPUTED AREAS WAS INLAND WATERS AS DETERMINED ACCORDING TO THE GEOGRAPHICAL CRITERIA FOLLOWED BY THE UNITED STATES IN THE CONDUCT OF FOREIGN RELATIONS

The Special Master ruled that the channels and other water areas between the mainland and the offshore islands within the area referred to by California as the "over-all unit area" were not inland waters, and that no one of the seven particular coastal

segments submitted to him for consideration was a bay constituting inland waters. Report, pp. 2–3. In this he was plainly right. Certainly none of those areas is inland waters under the geographical criteria described by the State Department.

The first segment, from Point Conception to Point Hueneme, forms the north side of the Santa Barbara Channel. The western entrance of the channel, between Point Conception and Richardson Rock, is about 21 miles wide, while its eastern entrance, between Point Hueneme and Anacapa Island, is about 11 miles wide. Calif. Brief, p. 106; see map opposite p. 94, Appendix to Calif. Brief. Even if the channel were to be considered a "fictitious bay" as California contends (Brief, 104–107), which it is not (see, *infra*, p. 149, n. 112), the 10-mile rule would prevent its being inland waters. Moreover, it is in fact a useful navigational strait connecting two areas of high seas, and as such could not be inland waters in any event.

The second segment, San Pedro Bay, has no real eastern headland, and no closing line can be drawn there that will enclose an area meeting either the semicircle test or the Boggs formula. Moreover, the alternative closing lines claimed by California are 13.1 and 19.3 miles long. See maps opposite p. 104, Appendix to California's Brief. The Special Master found that the part of the bay within the breakwater was inland waters, not as a bay but as a harbor. Report, p. 4. We agree that this is true for international purposes, and concede that the Submerged Lands Act has also given California the benefit of that fact for

purposes of this case, so the status of the area within the breakwater is not now in dispute.

The third segment, from San Pedro Bay to the western headland of Newport Bay, is simply open coast that could not be inland waters on any basis except as part of San Pedro Bay or the "over-all unit area." See maps opposite pp. 104 and 94, Appendix to California's Brief. Since neither San Pedro Bay nor the "unit area" meets the geographical criteria for inland waters, this segment necessarily fails.

The fourth segment, Crescent City Bay, cannot be enclosed by any line that meets the semicircle test or the Boggs formula. See maps opposite pp. 148 and 150, Appendix to California's Brief. The Special Master did rule that the waters of the bay, so far as they were within the breakwaters, were inland waters as a harbor. Report, pp. 4, 26. As in the case of San Pedro Bay, *supra,* we do not now dispute that ruling. The criteria described by the State Department provide no justification for lines enclosing the offshore rocks, as claimed by California.

The fifth segment, Monterey Bay, has a closing line 19.24 miles long. See map opposite p. 152, Appendix to California's Brief. Thus it does not meet the 10-mile rule. (While it does not meet the Boggs formula, we make no issue of that, since it does meet the semicircle test.)

The sixth segment, San Luis Obispo Bay, has a closing line 16 miles long and does not meet the Boggs formula or the semicircle test. See map opposite p. 180, Appendix to California's Brief.

The seventh segment, Santa Monica Bay, has a closing line 25.2 miles long, and does not meet the Boggs formula or the semicircle test. See map opposite p. 132, Appendix to California's Brief.

Since California's claims to the first, second, third, and seventh segments rested in part on the contention that they were part of an "over-all unit area of inland waters" extending from Point Loma to Point Conception and including all the islands south of Point Conception, the Special Master necessarily considered that claim as a whole, although it included areas outside any of the seven segments. The contention fails to meet any of the criteria stated by the State Department; those criteria required a belt of territorial sea to be drawn around each island, and precluded claiming any of the water between the islands and the mainland as inland waters. Under those criteria, a strait can be inland waters only if it leads only to inland waters, and then only if it is not over 10 miles wide. All of the passages between these islands connect areas of high seas, and except between the Santa Barbara Islands (San Miguel, Santa Rosa, Santa Cruz and Anacapa), they are all more than 10 miles wide.

Clearly, then, none of the water areas whose status is now in dispute meets the geographical criteria for inland waters stated by the State Department and applied by the United States in 1952 and 1953. We shall next proceed to show that other grounds urged by California in support of its claims are equally untenable.

B. NO OTHER LEGAL PRINCIPLE SUSTAINS THE CLAIMS OF CALIFORNIA

As we have shown, the Special Master was plainly correct in concluding that none of the disputed areas qualifies as inland waters under the geographical principles established by the policy and practice of the Executive Branch of the United States. Indeed, California makes virtually no attempt to argue the contrary. Instead, it contends that its claims to the disputed areas warrant recognition under other legal principles which, California asserts, properly apply to this case. We show below that these contentions have no merit.

Thus, California urges that the 24-mile closing line of the Convention on the Territorial Sea and the Contiguous Zone is presently recognized by the United States as a governing principle of international law and, as such, should be applied to this case. We show in response (*infra,* pp. 146–155) that the 24-mile line does not apply since it was not a recognized principle of international law in 1953 when Congress adopted the Submerged Lands Act and that even if it did apply, only Monterey Bay, of all the areas claimed by California, would become inland waters.

California also urges that under present principles of international law, recognized by the United States, it is entitled to all the waters which would be enclosed by the drawing of straight baselines. We point out (*infra,* pp. 155–159) that the principle of straight baselines is permissive rather than mandatory, that

such baselines may only be drawn by the national government and that the United States, in accordance with its historic position in favor of maximum freedom of the seas, has refused to draw such lines.

Finally, California contends that it is entitled to the disputed areas as historic inland waters, notwithstanding the fact that these areas do not qualify as inland waters under the pertinent geographical criteria. While we concede that California is entitled to waters over which the United States has exercised historic sovereignty as inland waters, we show (*infra*, pp. 163–171) that there has been no such exercise over any of the areas in question. We point out further (*infra*, pp. 171–178) that while there is no merit to California's argument that the historic exercise of sovereignty by a State, as distinguished from the United States, is sufficient, California has in fact never exercised such sovereignty over any of the disputed areas. Thus, with the one exception of Monterey Bay, California's claims would have to be rejected even under the legal principles which it contends apply.

1. THE 24-MILE CLOSING LINE OF THE CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE DOES NOT APPLY TO THIS CASE

a. *California is not entitled to the benefit of new principles of international law adopted after May 22, 1953*

California argues that, to the extent that international law principles affect this case, they should be determined by the Convention on the Territorial Sea and the Contiguous Zone which, since its ratification by the United States in 1961, has defined this nation's

international position (Brief, 86–121). The fallacy of this contention is that, as we have shown (*supra,* pp. 16–30), California's rights are defined by the Submerged Lands Act, which was passed in 1953, about eight years before the Convention was ratified by the United States and five years before it was executed.[109] The Act made a grant *in praesenti,* limited to a maximum extent seaward of three geographical miles from the coast line—that is, the ordinary low-water line and the outer limit of inland waters—as then defined. Subsequent changes in the legal definition of the coast line for purposes of international law neither enlarge nor diminish the extent of the grant made by Congress in 1953.[110] Thus the

[109] The Submerged Lands Act was approved May 22, 1953, 67 Stat. 33. The Convention on the Territorial Sea and the Contiguous Zone was executed April 29, 1958, 106 Cong. Rec. 11176, and was ratified by the President March 24, 1961, 44 State Dept. Bull. 609.

[110] The Senate Committee hearing on the conventions on the law of the sea included the following testimony by Arthur H. Dean, Special Consultant to the Department of State and chairman of the American delegation at the conference which prepared the conventions (Hearing, S. Foreign Relations Committee, Conventions on the Law of the Sea, Executives J, K, L, M, N, 86th Cong., 2d Sess., 19):

"Senator LONG. In this convention where the words 'coastal state' are used, it does refer insofar as we are concerned to the United States and other foreign powers, does it not?

"Mr. DEAN. Yes; it does.

"Senator LONG. And you made the statement here that this treaty does not affect any rights between the States of this Union and the United States, and it is not intended to?

"Mr. DEAN. It is not intended to. It is intended to affect

Convention is wholly irrelevant to the present case except to the extent that, as a codification of the prior law, it may shed light on what that law was. Its innovations have no effect here.

The principal innovation made by the Convention was the adoption, in Article 7, of 24 miles as the maximum permissible width of the entrance to a bay (other than an historic bay) recognized as inland waters. Prior to the Convention, as we have seen (*supra,* pp. 65–118), the United States had adhered to a 10-mile rule.[111] Indeed, as the State De-

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the rights of the United States as a sovereign with respect to the rights of other sovereign states.

"This treaty, being a treaty, a convention, rather, between sovereign states would not apply to relations under our Constitution between the rights of the several States and the Federal Government.

"Senator LONG. Right.

"You know at the present time there is a case over in the Supreme Court between the State of Louisiana and the United States that is relevant to some of the matters in this treaty?

"Mr. DEAN. Yes.

"Senator LONG. And it is not intended in any respect that this treaty should prejudice either the United States or the State government of Louisiana in that case before the Court?

"Mr. DEAN. That is correct, Senator."

[111] The commentary that accompanied the President's message submitting the Convention to the Senate for approval pointed out that the 24-mile closing line constituted a departure from prior United States policy (S. Execs. J to N, Inclusive, 86th Cong., 1st Sess., 6):

"Article 7 of the convention relates to bays, the coasts of which belong to a single state. Its most significant change of existing international law is the provision for a 24-mile closing line for bays. Prior to the decision of the International Court of Justice in the *Norwegian Fisheries* case, the United States and other important maritime countries had regarded the 10-

partment letter of February 12, 1952 (Appendix "A", *infra,* p. 11a), points out, the United States continued to follow the 10-mile rule even after the International Court of Justice held in the *Fisheries Case* that such adherence was not required by international law. It follows that California is not entitled to the benefit of the 24-mile rule in this case. This answers California's reliance on the 24-mile rule, not only as to bays (Brief, 102–104), but also as to "fictitious bays" (Brief, 104–107)[112] and straits (Brief, 107–113).

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mile closing line rule as established international law. The Court's holding that this rule was not sufficiently established left the true legal situation in doubt. Adoption of article 7 will remove that uncertainty."

The committee report on the Conventions said that "Fixing the allowable length of the closing line at 24 miles is a significant departure from the rule which had been recognized * * *" (S. Exec. Rep. No. 5, 86th Cong., 2d Sess., 3).

[112] California has argued that it is entitled to the Santa Barbara Channel as a "fictitious bay"—a body of water surrounded by islands not more than 24 miles distant from each other. Apart from the inapplicability of the 24-mile rule, international law recognizes no principle of "fictitious bays." The expression seems to have originated in a proposal by the Committee of Experts, made to the Fifth Session of the International Law Commission, suggesting a 10-mile rule for bays, a general 10-mile limit for straight baselines, providing that baselines should not be drawn to islands more than 5 miles from shore, and limiting baselines to 5 miles in groups of islands or between such groups and the mainland, except that in such a group one opening could be 10 miles. The latter situation was called a "fictitious bay." The Special Rapporteur adopted this proposal in an Addendum to the Second Report on the Regime of the Territorial Sea, International Law Commission, Fifth Session, 18 May 1953. English text, U.N. Doc. A/CN.4/61/Add.1, p. 7 and Annex, p. 4. The subject of groups of islands was postponed by the Commission in

b. *Only Monterey Bay, of the areas claimed by California, would become inland waters if the 24-mile closing line applied*

Even if the 24-mile rule were applicable (which we deny), the only disputed area affected would be Monterey Bay, for it is the only area which would qualify as inland waters under the combined 24-mile rule and semicircle test prescribed by Article 7 of the Convention. As shown by the map opposite page 152 of the Appendix to California's brief, the closing line of Monterey Bay measures some 19.24 miles. We concede that this line encloses an area of water greater than the area of a semicircle of equal diameter. Other indentations whose closing lines measure less than 24 miles—San Louis Obispo Bay, 16 miles;[113] and San Pedro Bay, 19.3 miles[114]—would not qualify as inland waters even under the 24-mile rule because the area of the enclosed waters is not sufficient to meet the semicircle test.

1954 (Article 11, *Report of the International Law Commission Covering the Work of Its Sixth Session* (U.N. Doc. A/CN.4/88), p. 42), and there is no special provision on the subject in the Convention on the Territorial Sea and the Contiguous Zone as finally adopted. The Report of the International Law Commission on the Work of Its Eighth Session, p. 45, fn. 1 (U.N. Doc. A/C.6/L.378), makes clear that the original proposal on the subject was an attempt to formulate a rule and not an expression of a rule already in existence.

[113] See map opposite page 180 of the Appendix to California's brief.

[114] See map opposite page 104 of the Appendix to California's brief. The closing line to Santa Monica Bay, as shown on the map opposite page 132 of the Appendix to California's brief, measures 25.2 miles and thus it would not qualify as inland waters even if the 24-mile rule were applicable.

Nor would the 24-mile closing line be of help to California's claim to the Santa Barbara Channel waters. California claims this area (Brief, 106) as a channel leading to inland waters whose width measures less than 24 miles, although more than 10 miles. The claim must fail, however, exclusive of the proper limit upon the closing line, for the channel in question meets all the criteria for a strait connecting areas of the high seas.

California initially argues that the channel "Unquestionably * * * leads only to an inland sea or waters." Brief, 106. The contention is refuted by the obvious geographical facts. The western entrance of the Santa Barbara Channel, between Point Conception and San Miguel Island, leads to the open waters of the Pacific Ocean. Its eastern entrance, between Point Hueneme and Anacapa Island, leads to waters that the United States contends, and the Special Master found (Report, 27, 29), are likewise part of the open sea. The sole basis on which California claims the status of inland waters for the latter area east of the Santa Barbara Channel is as part of an "overall unit area of inland waters"—either the entire area from Point Loma to Point Conception, embracing all the islands, or alternatively an inner area from Newport Beach to Point Conception, embracing all the islands except San Clemente, San Nicolas, and Begg Rock.[115] Either "unit" in-

[115] See second map opposite page 30 in California's Brief in Relation to Report of Special Master of May 22, 1951 (filed July 31, 1951).

cludes the Santa Barbara Channel itself. If the "unit" is inland waters, that includes the Santa Barbara Channel as part of the "unit," and there is no need to give any separate consideration to the status of the Santa Barbara Channel as a strait; if the "unit" is not inland waters, then the Santa Barbara Channel connects areas of high seas and cannot qualify as a strait leading to inland waters. California is merely trying to prove that part of the "unit" is inland waters by assuming that all of the "unit" has that status.[116]

Next California argues (Brief, 109–113) that the waters between the islands and the mainland do not qualify as straits because the volume of international traffic is slight, apart from vessels bound to or from local ports. However, in the *Corfu Channel Case,* I.C.J. Reports, 1949, p. 4, at p. 28 (*supra,* p. 135), the court specifically rejected that test. Further, California's own witnesses testified that the passages between the islands and the mainland are used by vessels not bound for local ports.[117] Their testimony

[116] No possible application of the 24-mile rule could make inland waters of the area east of the Santa Barbara Channel, since the openings on the west are about 35 miles wide, both between Santa Barbara and Anacapa Islands, and between Santa Cruz Island and Begg Rock.

[117] Mr. Brubaker, Marine Superintendent for the Luckenbach Steamship Company, said (Tr. 589 at 595):

"Your ordinary route, coming down from the Pacific Northwest going to the Canal takes you outside of these islands, but I know many skippers—and I have done it myself—come down the coast and cut inside, and I could paint my

clearly shows that this has been a "useful route" between areas of high seas; as such, it cannot be inland waters.[118]

Finally, California points to the United States' recognition of Chandeleur and Breton Sounds, in Louisiana, as inland waters, and attempts to show that the Santa Barbara Channel is not distinguishable. Brief, 33–34, n. 14, and maps following 34; 82; 106–107. As we have pointed out (*supra*, p. 110), there is no opening into Chandeleur or Breton Sound wider than 10 miles while the western entrance to the Santa Barbara Channel, between Point Conception and

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decks then—if I went outside I couldn't—and maintain the cleanliness of the vessel."

Captain Leisk said (Tr. 602 at 608):

"The use that is made of the islands, I would say principally, their protection is there valued most possibly by the fishing industry, by ships coming down possibly from the north, coming down there through the islands, and get much better weather through the inside than they do outside. It may be a little longer, but some of them do that."

[118] As showing the unimportance of these straits internationally, California points to the fact that they have not been included in lists of international straits such as that prepared by Commander Kennedy for the United Nations Conference on the Law of the Sea. Brief, 111, n. 69. However, this is not significant. Neither did Commander Kennedy include the Great Belt, the Little Belt, the Strait of Canso, or Shimonoseki Strait, in all of which the United States has insisted on a right of passage (*supra*, pp. 121–130), nor the Solent (see *supra*, pp. 131–134), nor the Corfu Channel. Kennedy, *A Brief Geographical and Hydrographical Study of Straits Which Constitute Routes for International Traffic* (U.N. Doc. A/CONF. 13/6 and Add. 1), reprinted in *United Nations Conference on the Law of the Sea: Official Records*, Vol. 1, Preparatory Documents (U.N. Doc. A/CONF. 13/37), 114, 132. Obviously, such lists are not exhaustive.

Richardson Rock, is about 21 miles. Thus the analogy fails at the outset, unless California is entitled to the benefit of the 24-mile rule. But even apart from this, the two bodies of water are utterly dissimilar. The Santa Barbara Channel connects the high seas of the Pacific Ocean with other waters which we believe, and the Special Master found, are likewise high seas; and it is actually used as a route for shipping not going to or from local ports. Chandeleur and Breton Sounds, on the contrary, lead nowhere; they are simply an enclosed lagoon in a cul-de-sac of the Gulf of Mexico. Moreover, even if international traffic wanted, for some inexplicable reason, to go through the maneuver of making a loop into the sounds at one end and back out again at the other, it could not do so because there is not sufficient depth.[119] Not only is it not a "useful" route for international traffic, it is not even a feasible one. California is correct in saying (Brief, 107), that depth is not a recognized test of inland waters; but navigability is certainly a primary test of international straits.[120] The determinative distinction is that the

[119] According to the soundings shown on Coast & Geodetic Survey Chart No. 1270, the depth is in general from 6 to 12 feet, but there is no passage as much as 12 feet deep between the northern and southern ends of the sounds.

[120] As tidewater, Chandeleur and Breton Sounds are in a legal sense "navigable waters," even in those parts that are too shallow for navigation. See *United States* v. *Turner*, 175 F. 2d 644, 647 (C.A. 5), *certiorari denied*, 338 U.S. 851. However, a strait is not subject to an international right of passage unless it is a useful route of navigation in its natural condition. Thus, the *Fisheries Case* held that the Indreleia (a navigational route along the Norwegian coast inside the is-

Santa Barbara Channel is a used and useful channel for international traffic between areas of high seas, while Chandeleur and Breton Sounds are not.

2. CALIFORNIA IS NOT ENTITLED TO THE WATERS WHICH IT SEEKS TO ENCLOSE BY STRAIGHT BASELINES

Article 4 of the Convention on the Territorial Sea and the Contiguous Zone permits the use of straight baselines in some circumstances (106 Cong. Rec. 11174). The provision was not an innovation of the Convention. It merely formulated with somewhat greater precision the principles announced by the International Court of Justice in the *Fisheries Case,* I.C.J. Reports, 1951, p. 116.[121] Thus, even before ratifying the Convention, the United States had to recognize that international law permitted a nation, if the latter chose, to establish straight baselines under the conditions described in the *Fisheries Case.*

California asserts that the principle of straight baselines applies to the coast of California and that under this principle it is entitled to claim as inland waters all waters landward of such baselines. Brief, 91–102. We may question how comparable the coast

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lands) is not an international strait because its utility depends on navigational aids maintained by Norway. I.C.J. Reports, 1951, p. 116 at 132. The California channels are useful without artificial improvement. See Tr. 323, 330–331.

[121] See testimony of Arthur H. Dean, Special Consultant to the Department of State, and chairman of the American delegation at the 1958 conference which produced the Convention. Hearing, S. Committee on Foreign Relations, Conventions on the Law of the Sea, Executives J, K, L, M, N, 86th Cong., 2d Sess., 2, 23–24.

of California is to that of Norway,[122] the unusual geographical configuration of which was said by the International Court of Justice to be the justification for the liberal use of straight baselines allowed in the *Fisheries Case* (I.C.J. Reports, 1951, at p. 133); but it is not necessary to consider that question because the controlling fact is that the United States has not used straight baselines on the coast of California (or anywhere else).

Straight baselines do not come into existence spontaneously or necessarily.[123] They must be drawn, and the decision of whether and where to draw them involves determinations of policy and judgment that are

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[122] The Norwegian coast involved in the *Fisheries Case* had about 120,000 insular formations in a length of 1,500 kilometers (about 800 geographical miles). I.C.J. Reports, 1951, at p. 127. The Coast & Geodetic Survey charts and Geological Survey maps for the coast of California from Point Conception to Point Loma, about 200 geographical miles, show 11 islands of appreciable size (counting Anacapa as three, and including Prince Island, close to the east end of San Miguel), two isolated rocks (Begg Rock and Richardson Rock), plus a few scatterings of minute rocks in the immediate vicinity of the shore in perhaps a dozen localities. Between Points 12 and 48 of the Norwegian baseline (*i.e.*, the part dependent on islands; see map in Calif. Brief opposite p. 92), the area between the baseline and the mainland (excluding fjords) was about 1/3 islands and 2/3 water; California's "overall unit area" is about 1/29 islands and 28/29 water. Tr. 1170–1176.

[123] "In the first place it should be pointed out that the use of the straight baseline method * * * is permissive. The rule does not operate automatically * * *." Answers to Questions of Senate Foreign Relations Committee Concerning the Law of the Sea Conventions (Executives J to N, Inclusive) (Prepared by the Department of State, March 2, 1960), Hearing, S. Committee on Foreign Relations, Conventions on the Law of the Sea, Executives J, K, L, M, N, 86th Cong., 2d Sess., 82, 84.

plainly within the exclusive province of the policy-making branches of the federal government. As the court said in the *Fisheries Case,* I.C.J. Reports, 1951, at p. 132, "the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it * * *." ("State" is there used, of course, in the international law sense of "nation." Cf. n. 110, p. 147, *supra;* n. 127, p. 164, *infra.*) It would be utterly disruptive of any coherent and responsible foreign and defense policy to accept California's suggestion (Brief, 85, 101–102) that a coastal State of the Union may make its own decision as to how far the United States is to avail itself of the possibility of drawing straight baselines. This is well illustrated by the present case, where California has taken a position directly contrary to that of the State and Defense Departments as to what policy will best serve the interests of the United States.[124] In the Brief for the State of California in the Proceedings Before the Special Master (June 6, 1952), California said (p. 121):

> The agency which determines the outer limits of inland waters will thus be doing much more than fixing a theoretical line. It will be determining how near foreign warships and aircraft

[124] See, *e.g.*, H. Rept. No. 2515, 82d Cong., 2d Sess. ("Report of the Committee on Interior and Insular Affairs, House of Representatives, pursuant to H. Res. 676, 82d Cong., Authorizing an Investigation and Study of the Seaward Boundaries of the United States"), pp. 17–19 (Cong. Doc. Ser. No. 11578); testimony of Arthur H. Dean, Special Consultant to the Department of State, in Hearing, S. Committee on Foreign Relations, Conventions on the Law of the Sea, Executives J, K, L, M, N, 86th Cong., 2d Sess., 5, 13, 21, 22.

> may lawfully approach our shores and harbor installations. It also will be fixing the location of our neutrality zone, for that has been one of the historic functions of the marginal belt. The sum of the matter is that the fixing of the baseline will determine whether foreign nations are to have rights in the waters surrounding our island military installations and between these installations and our coastal bases *or* whether those waters are to be set aside for the exclusive jurisdiction of the United States.
>
> It would appear that there are military dangers to placing the belt immediately adjacent to our shores, and on the other hand, military advantages to placing it as far seaward as possible. It is the belief of California that the protection of our harbors, the security of our military bases on the shore and on the offshore islands, and the integrity of our inland shipping lanes demand the placement of the marginal belt as far seaward as can be done within the limits of international practice. * * *

The Special Master was plainly right in concluding that it was beyond his province to decide which would be the better policy for the United States to follow in delimiting its inland waters. Report, pp. 6–7, fn. 6; 29; 40; 42–43. It is equally plain that the matter cannot be left to be decided in twenty-two different ways according to the wishes of the twenty-two coastal States, but must be decided by the policy-making branches of the federal government. See *supra,* pp. 36–42.

Because straight baselines are purely artificial and discretionary, they never have any existence or effect

until formally promulgated, as Norway had done in the *Fisheries Case*. That principle is specifically recognized by the Convention on the Territorial Sea and the Contiguous Zone. Article 4, Paragraph 6, provides (106 Cong. Rec. 11174): "The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given." No baselines had been promulgated by the United States in 1953, when California's rights under the Submerged Lands Act became fixed, and indeed none have been promulgated by the United States to this day. Thus it is entirely beside the point to debate whether the coast of California is such as would justify the use of any straight baselines or, if so, how they might be drawn.

3. NO SPECIAL CHARACTERISTICS OF THE PACIFIC COAST WARRANT AN EXCEPTION FROM ESTABLISHED GEOGRAPHICAL CRITERIA

California modestly suggests (Calif. Brief, 137–141) that the Pacific coast is, after all, an out-of-the-way place, remote from important spheres of commercial activity or foreign intercourse, where the international community may reasonably be expected to tolerate broader maritime claims than on seas having significant international interest. The suggestion is directly opposed to the repeatedly announced position of this country. It was in 1864 that we maintained, by force of arms, our right to navigate Shimonoseki Strait from the Pacific Ocean to the Korea Strait (*supra,* p. 129. In 1886, Secretary of State Bayard announced that we considered the coasts of the Pacific northwest necessarily subject to the same limits as the Atlantic seaboard (*supra,* pp. 88–89). We formally disvowed

any claim beyond the usual three-mile limit in Bering Sea, both in the Fur Seal Arbitration of 1893 (*supra*, p. 113, fn. 89) and in the Whaling and Sealing Arbitration of 1902 (*supra*, pp. 102–103). In the Alaska Boundary Arbitration of 1903 we denied that lines longer than ten miles could be drawn across Yakutat Bay or the entrances to the Alaska Archipelago (*supra*, pp. 105–107). In 1935 we protested against Ecuador's claim of a six-mile marginal sea. 4 *Foreign Relations of the United States*, 1935, p. 514, 516. The coast of California is no less important today than those waters were at those times. Indeed, we know of no basis on which the Court might take judicial notice that the contrary is the case, or might overrule the State Department's determination to assert uniform maritime limits on all the coasts of the United States.

4. CALIFORNIA'S CLAIMS ARE NOT JUSTIFIED ON HISTORIC GROUNDS

a. *The United Nations studies of historic waters do not conflict with the special master's findings*

The Special Master found that the disputed areas are not historic inland waters (Report, 30–39), and California has excepted to that ruling (Calif. Exceptions, No. VIII, pp. 11–13). Closely related is California's exception to the Report on the ground that the Special Master did not have the benefit of two United Nations documents on the subject of historic waters, published in 1958 and 1962, respectively (Calif. Exceptions, No. II, p. 5); and the importance of those documents is emphasized in California's discussion of the subject of historic waters (Brief, 121–

137, at 121–131). We find nothing in those documents to impair the soundness of the Special Master's reasoning or his conclusions.

The first of the United Nations documents, entitled *Historic Bays,*[125] is a memorandum compiled by the United Nations Secretariat as a preparatory document for the 1958 Conference on the Law of the Sea. It includes accounts of illustrative bays that "are regarded as historic bays or are claimed as such by the States concerned" (p. 10), international case law, and excerpts from official and unofficial writings on the subject, grouped by topic and viewpoint. It is, in effect, a digest of relevant material. The second of the United Nations documents, entitled *Juridical Regime of Historic Waters, Including Historic Bays,*[126] is a study prepared by the Codification Division of the Office of Legal Affairs, at the request of the International Law Commission. It consists of an analytical discussion of various legal concepts pertaining to the subject of historic waters. This is the document on which California principally relies; but it seems to us, so far as it is relevant, fully to support the Special Master's conclusions.

Citing the conclusions of the *Juridical Regime of Historic Waters* (pp. 21–31), California urges (Br. 124–125) that the Special Master erred in considering historic claims to be an "exception" to the general rule based upon geographic criteria. As a conse-

[125] U.N. Doc. A/CONF.13/1 (Sept. 30, 1957), printed in *United Nations Conference on the Law of the Sea; Official Records*, Vol. 1, Preparatory Documents (U.N. Doc. A/CONF. 13/37), pp. 1–38.

[126] U.N. Doc. A/CN.4/143 (March 9, 1962).

quence of treating such claims as "exceptional," California asserts that the Special Master erroneously required its proof of historic title to meet a "rigorous" standard. The short answer to this contention is that the Special Master imposed no such stringent standard. He rejected its historic claim, not because the evidence was not "exceptionally strong" but because he found the weight of the evidence to be against it. As he said (Report, 38–39):

> After painstaking consideration of California's position as thus stated in their brief, I conclude that this California Statute of 1949, two years after the decision of this Court in the *California* case, is the first explicit assertion by California of exclusive authority over these water areas in dispute, or that these water areas constitute inland waters. Furthermore, I accept the contention of counsel for the United States, fully supported by the evidence and fairly stated, I think, in their brief (U.S. 134–148) that California, from 1933 to 1949, by its legislation as to Fish and Game Districts and as to county boundaries has recognized that its seaward boundary in the so-called "unit area" runs three miles from the mainland.

Further, the only language in the Special Master's Report relating to the exceptional nature of historic claims appears at page 35, where he explains that American claims to Delaware and Chesapeake Bay rested on historic grounds, despite the 10-mile rule, and did not disapprove the rule as one of general ap-

plication. This is plainly correct, and there is nothing in the United Nations study to the contrary. That study clearly shows that every historic claim is to be considered unique and must rest on its own evidence. As we shall show, California's evidence wholly failed to meet even the most basic requirements of the United Nations study.

b. There has not been the necessary exercise of sovereignty by the United States over any of the disputed areas

(1) An Historic Claim Requires an Effective Exercise of Sovereignty by the National Government

As stated in *The Juridical Regime of Historic Waters,* pp. 37–38:

> There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States. First, the State must exercise authority over the area in question in order to acquire a historic title to it. * * *

We shall not have to consider factors (2) and (3) discussed in the study, since California's case fails on the first factor. The United States has not exercised the requisite authority over the areas in question. It is understood, of course, that by "State" the United Nations study means a nation, not a State of

the United States.[127] The United Nations study makes clear that the first and fundamental ingredient of any historic claim is an actual, effective, continuous exercise of sovereignty over the area by the coastal nation (p. 39):

> There can hardly be any doubt that the authority which a State must continuously exercise over a maritime area in order to be able to claim it validly as "historic waters" is sovereignty. An authority more limited in scope than sovereignty would not be sufficient to form a basis for a title to such waters. * * *

The study goes on to explain that the nation need not exercise *all* the rights or duties of sovereignty, but in some way it "must have acted and act as the sovereign of the area" (p. 40). It discusses some examples,[128] and continues (pp. 42–44, footnotes omitted):

> In the first place the acts must emanate from the State or its organs. Acts of private individuals would not be sufficient—unless, in

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[127] See n. 110, *supra*, p. 147. Cf. *Restatement of the Foreign Relations Law of the United States* (Proposed Official Draft, 1962), § 4:

"Except as otherwise indicated, "state," as used in the Restatement of this Subject, means an entity that has a defined territory and population under the control of a government and that engages in foreign relations."

Comment *b* to the foregoing section includes the statement that "the governmental entity that is a state under international law is one that engages in foreign relations and assumes responsibility for its acts in such relations."

[128] As an example of insufficient action, the study suggests (pp. 39–40) mere use of a water area for fishing, without exclusion of foreign fishermen.

exceptional circumstances, they might be considered as ultimately expressing the authority of the State. * * *

96. Furthermore, the acts must be public; they must be acts by which the State openly manifests its will to exercise authority over the territory. The acts must have the notoriety which is normal for acts of State. Secret acts could not form the basis of a historic title; the other State must have at least the opportunity of knowing what is going on.

97. Another important requirement is that the acts must be such as to ensure that the exercise of authority is effective.

* * * * *

The first requirement to be fulfilled in order to establish a basis for a title to "historic waters" can therefore be described as the effective exercise of sovereignty over the area by appropriate action on the part of the claiming State. * * *

In the present case, it is clear that there has been no exercise of sovereignty over the disputed areas by the United States—indeed the evidence is all to the contrary (see *infra,* pp. 170–171). California seeks to avoid this difficulty by asserting that its own actions are an adequate substitute (Brief, 128–129). The Special Master did not reach this question, as he found that California itself had not asserted jurisdiction over the disputed area until 1949 (Report, 31–39). As we show below (*infra,* pp. 171–176, and Appendix "B", pp. 19a–29a), this conclusion was fully justified. However, we also think it clear that even

if California had asserted jurisdiction over the area, such assertion could not be effective, at least against the disclaimer of the federal government.

Our constitutional system gives all power over foreign relations and external affairs to the national government, to the exclusion of the States. This Court has so held from the earliest times. *E.g.*, *Holmes* v. *Jennison,* 14 Pet. 540, 570; *United States* v. *Pink,* 315 U.S. 203, 233–234; *United States* v. *Belmont,* 301 U.S. 324, 331–332; *Chinese Exclusion Case,* 130 U.S. 581, 606; *Hines* v. *Davidowitz,* 312 U.S. 52, 63. The establishment of maritime limits is a political matter in the field of foreign policy (*supra,* pp. 36–42), and as such it is necessarily within the exclusive province of the federal government. As this Court held in the present case, "whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units." *United States* v. *California,* 332 U.S. 19, 35.

The extension of the maritime limits of the United States is equally beyond the power of a State, whether the action be viewed as the settlement of a boundary, *Lattimer* v. *Poteet,* 14 Pet. 4, 14, or as an acquisition of new territory, see Burdick, *Law of the American Constitution* (1922), p. 279; 1 Willoughby, *The Constitution of the United States* (2d ed.), pp. 407–425. Such powers are the exclusive prerogatives of the federal government, not by delegation from the States but by virtue of its status as a

member of the family of nations. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 317–319; *Downes* v. *Bidwell*, 182 U.S. 244, 285 (opinion of Brown, J.).

What a State cannot do directly, it cannot do by indirection. If State action in exercising sovereignty over these waters were to be held to establish an historic title to them, contrary to the policy and wishes of the federal government, the result would be just as disruptive to the course of national policy as if the State were permitted to act by legislation or to enter into foreign treaties on the subject.

California cites (Brief, 128-129) situations where national claims have been supported by reference to actions of State or local authorities. In every case, the national government chose to endorse the claim, and referred to those actions to support it. Such cases do not show that the national government may be required to acquiesce in such a claim (and consequently to maintain it against other nations), contrary to its own wishes and policy.

The cases are also distinguishable in other ways. In his opinion in the matter of *The Grange*, 1 Ops. A.G. 32, which California cites to prove reliance upon State activities, Attorney General Randolph also pointed out (p. 33)—

> That, from the establishment of the British provinces on the banks of the Delaware to the American revolution, it was deemed the peculiar navigation of the British empire.
>
> That by the treaty of Paris, on the 3d day of September, 1783, his Britannic Majesty relin-

> quished, with the privity of France, the sovereignty of those provinces, as well as of the other provinces and colonies.

Again, he pointed out that Congress had included the waters of Delaware Bay in a collection district by its first collection law (*id.* 37.). Thus, the State claims which he mentioned were but part of a complete picture which included an assertion of jurisdiction by the prior sovereign to whose rights the United States succeeded, and an assertion of jurisdiction over the area by Congress itself.

State action similarly concurred with federal action in the *St. Croix River Arbitration,* 1797 (Brief, 128, n. 81). As stated in the Case of the United States (1 Moore, *International Adjudications, Modern Series,* 162):

> The testimony of John Albe[e], is offered to shew that he, under the orders of the State of Massachusetts, warned those settlers to depart, on their first entry, and the records of that State *and of Congress,* copies of which are on the table, numbered from 1 to * * * inclusively, exhibit proof of the proceedings of that Government, *and the Government of the Union,* against those settlers * * *. [Emphasis added.]

Likewise in the *Minquiers and Ecrehos Case,* I.C.J. Reports, 1953, p. 47, at p. 66 (Brief, 128, n. 80), the court pointed out:

> By a British Treasury Warrant of 1875, constituting Jersey as a Port of the Channel Islands, the "Ecrehou Rocks" were included within the limits of that port. This legislative

> Act was a clear manifestation of British sovereignty over the Ecrehos at a time when a dispute as to such sovereignty had not yet arisen. * * * [129]

The fact that the federal government may be responsible under international law for the acts of subordinate units against foreign nationals (Brief, 128–129) does not mean that those units are free to adopt foreign policies for the national government. *Manchester* v. *Massachusetts,* 139 U.S. 240, on which California relies (Brief, 8, 69, 85, 102), must be read in the light of the factual situation before the Court. Massachusetts was claiming jurisdiction over the waters of Buzzard's Bay which, as the Court pointed out (139 U.S. at 264), "are, of course, navigable waters of the United States." The Court's language should not be understood as meaning that Massachusetts could have claimed more than the United States; that question was not presented or considered.

Neither reason nor authority supports the view that State action, without the concurrence of the federal government, can establish historic title to waters not claimed or desired by the United States.[130]

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[129] California also quotes (Brief, 128, n. 81) Thomas Jefferson's letter of November 8, 1793, to the British Minister, "For the jurisdiction of the rivers and bays of the United States, the laws of the several States are understood to have made provisions, * * *" omitting the following phrase, "and they are, moreover, as being landlocked, within the body of the United States."

[130] *A fortiori*, a nation cannot be compelled to accept jurisdiction on the ground that an "historic title" has been imputed to it by legal writers. See Calif. Brief, 135.

(2) *The United States Has Not Exercised Sovereignty Over the Disputed Areas*

There has been no action by the United States that could properly be described at "the effective exercise of sovereignty over the area" (*Juridical Regime of Historic Waters,* 44). As we have already explained (*supra,* pp. 113–115), *United States* v. *Carrillo,* 13 F. Supp. 121 (S.D. Calif.), was a prosecution for four offenses, none of which depended on there being United States sovereignty over the situs of the offense. The dismissal of two counts by the court, whatever its rationale may have been, was obviously not an "effective exercise of sovereignty" over any area whatever. *People* v. *Stralla,* 14 Cal. 2d 617, 96 P. 2d 941 (*supra,* p. 111), was a State prosecution in a State court. The filing of an *amicus curiae* brief by the United States Attorney, whatever the circumstances (see *supra,* pp. 111–113), was not an "effective exercise of sovereignty" by the United States. As stated in the *Juridical Regime of Historic Waters,* p. 43:

> On this point there is full agreement in theory and practice. Bourquin expresses the general opinion in these words:
>
> "Sovereignty must be effectively exercised; the intent of the State must be expressed by deeds and not merely by proclamations."

Similarly, *Ocean Industries* v. *Superior Court,* 200 Cal. 235, 252 Pac. 722, was a State proceeding in a State court.[131]

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[131] *Rex., Inc.* v. *Superior Court,* 34 Cal. App. 2d 96, 93 P. 2d 182, likewise involved State proceedings in a State court.

Ocean Industries v. *Greene,* 15 F. 2d 862 (N.D. Calif.), was a suit in equity by a Nevada corporation to enjoin California officials from interfering with a fish-reduction ship in Monterey Bay; federal jurisdiction apparently was premised on diversity of citizenship. The case was dismissed by the court for lack of jurisdiction; and while this conclusion depended on the court's view that Monterey Bay was within the boundary of the State of California, the dismissal cannot be called an "effective exercise of sovereignty" by the United States.

The effect of Congress' implied approval of the boundary described in the California Constitution depends, of course, on the meaning of that description. As we explain below (*infra,* pp. 173–178), the description did not include the disputed areas as inland waters.

c. California has not historically exercised sovereignty over the disputed areas

Even if, contrary to established principle, the exercise of sovereignty by one of the twenty-two coastal States were sufficient to establish an historic claim to inland waters, California's contentions would still fail. The evidence shows that California has never exercised the necessary sovereignty over the disputed areas.

(1) *Character of the necessary action.*—Historic waters are not necessarily inland waters. The doctrine of historic title applies "to all those waters which can be included in the maritime domain of a State." *Juridical Regime of Historic Waters,* p. 17. Thus, historic waters may be only territorial waters like the three-mile belt. Moreover (*id.,* p. 40)—

> The activities carried on by the State in the area or, in other words, the authority continuously exercised by the State in the area must be commensurate to the claim. * * *

Thus, to sustain a claim of historic *inland* waters, the acts of sovereignty relied on must be such as relate to the sort of exclusive jurisdiction that a nation has over its inland waters. Acts equally appropriate to territorial waters could not prove more than an historic territorial status for the area.

None of the historic actions invoked by California, even if imputed to the United States and taken at their face value, would show more than an assertion that the disputed areas were within the boundary of the State and were subject to such jurisdiction as the State may exercise over the territorial waters of its marginal sea. Inclusion within the State boundary by the Constitution, regulation of fishing, enforcement of criminal laws—none of these is peculiar to inland waters. Consequently, such actions do not establish that the disputed areas are inland waters.

It is clear that California's rights in the present case, formerly under *Pollard* v. *Hagan,* 3 How. 212, and now under the Submerged Lands Act (see *supra,* pp. 16–26), are entirely dependent on establishing that the disputed areas are *inland* waters.[132] Thus California's historic claims cannot possibly serve their purpose, even if the claims themselves were to be

[132] Compare the Special Master's observation that "there has been a certain cloudiness arising out of the indiscriminate use of the word 'bay' because the question in the case is when is a bay inland waters?" Tr. 1214.

accepted. In fact California has not asserted any kind of territorial jurisdiction over the disputed areas (outside of the usual three-mile belt drawn in general accordance with the principles we have described) until very recently.

(*2*) *State and county boundaries.*—Article XII of the California Constitution of 1849, provided:

> The boundary of the State of California shall be as follows:
>
> [Commencing at the northeastern corner of the State, running southward to the Mexican border] thence running west and along said boundary line, to the Pacific Ocean, and extending therein three English miles; thence, running in a northwesterly direction and following the direction of the Pacific Coast, to the 42d degree of north latitude; thence, on the line of said 42d degree of north latitude to the place of beginning. Also all the islands, harbors, and bays, along and adjacent to the Pacific coast.

Article XXI, Section 1, of the California Constitution of 1879 is substantially the same. California contends that the boundary so described comprises a single line extending into the ocean so as to embrace all the disputed areas, including the waters east of the offshore islands, plus a three-mile belt; and in 1949 the California Legislature passed an Act so declaring. Calif. Govt. Code, secs. 170–172, Calif. Stats. 1949, c. 65, pp. 82–83. The natural meaning of the words of the constitution is to the contrary. Moreover, previous actions of the Legislature are irreconcilable with the State's present contention.

Article XI, Section 4, of the California Constitution of 1849 required the Legislature to establish county governments, and the Supreme Court of California has held that the Legislature was required to divide the entire territory of the State into counties, including its coastal waters. *Ocean Industries* v. *Superior Court,* 200 Cal. 235, 243–244, 252 Pac. 722. As demonstrated by the detailed review of the legislation describing the county boundaries which is attached as Appendix "B", *infra,* pp. 19a–29a,[133] the Legislature has always understood that that State boundary is three miles from the mainland, that the islands are separate adjuncts and not embraced within a boundary extending out from the mainland, and that the inland waters of San Pedro Bay extend, at the most, no farther east than a point opposite the eastern end of the present breakwater.

More specifically, this legislation shows that, from the earliest descriptions in 1850 down to the 1947 revisions now in effect, the Legislature has always understood that the State boundary, between the Mexican border and Point Conception, is three miles from the mainland. Similarly, the description of Orange County has specifically declared the State boundary to be three miles from shore at a point about nine miles east of Point Fermin, thus proving that

[133] In Appendix "B", *infra,* at p. 20a, we have inserted a sketch map showing the geographic points mentioned. This map is based on U.S. Exhibits J(1), J(2) and J(3) (identified at Tr. 1277, 1289 and 1294, respectively, and admitted at Tr. 1298) and accompanying testimony by A. J. Wraight, a geographer and cartographer with the United States Coast and Geodetic Survey, Tr. 1272–1299.

the baseline is on the shore at that point. The placement of the baseline by the Legislature rules out the closing line of San Pedro Bay which California now claims.

Three of the counties are described as "including" certain islands, *e.g.,* Santa Barbara Island, San Nicolas Island, San Clemente Island. The descriptions make clear that the islands are separate parts of the counties and refute California's claim that continuous boundary lines extend out from the shore to embrace the islands. Thus, such extensions would require those lines to run from 20 to 50 miles or more in directions entirely different from those stated by the Legislature, and not "parallel to the coast" as is often specified. Moreover, such an extension of Ventura County, to take in San Nicolas Island, would have to cross over an extension of Santa Barbara County to take in Santa Barbara Island—an obviously impossible situation for which California has never offered a solution. A 1919 statute, although held unconstitutional because not a "general" law, clearly shows the Legislature's understanding that Los Angeles County includes two islands "with the adjacent waters three miles from shore."

(3) *Santa Monica city limits.*—Similar recognition that the State boundary follows three miles from shore around Santa Monica Bay, and does not cross from headland to headland, is found in the 1906 freeholders' charter of Santa Monica, approved by the Legislature in 1907. Calif. Stats. 1907, res. c. 6, p. 1007. The north and south boundaries of the city are there described as extending out from "the ordi-

nary tide line of the Pacific Ocean" on two convergent lines to "the Westerly boundary line of Los Angeles County (in the Pacific Ocean)", intersecting a segment thereof which was taken as the western boundary of the city. (See map opposite p. 20a, Appendix "B", *infra.*) As Mr. A. J. Wraight of the Coast and Geodetic Service demonstrated, those north and south lines would have met before reaching a line three miles seaward of the headland-to-headland line between Point Vicente and Point Dume which California now claims is the border of inland waters. Tr. 1293–1298; U.S. Exh. J(3), Tr. 1294 and 1298. To have been intersected by those north and south lines, as described by the charter, the county boundary must have been somewhere closer to the shore; and as there are no headlands that could produce such a line, the only alternative is that the county boundary was three miles from the shore, as the United States contends. As explained above, this would necessarily indicate also the location of the State boundary.

(4) *Fish and Game Districts.*—The California Fish and Game Code of 1933 described various Fish and Games Districts as including "state waters" in various areas without defining the extent of those waters. As was testified by California's own witness, Mr. Schilling, a law enforcement officer for the California Department of Fish and Game, from 1933 until enactment of the Fish and Game Code of 1949, the Department of Fish and Game construed those provisions as designating a belt of waters three miles wide along the mainland shore and around each island. Tr. 1080–1083.

(5) *Adjudications.*—Courts have several times taken a view contrary to California's present claims. In *Muchenberger* v. *City of Santa Monica,* 206 Cal. 635, 638, 275 Pac. 803, the court said, "The boundary of the City of Santa Monica on the west is a line three miles westerly of the line of the mean high tide of the Pacific Ocean." This of course corroborates the conclusion reached above (*supra,* p. 176) that the city, county, and State boundary must be three miles from the shore at Santa Monica rather than three miles outside a headland-to-headland line. Thus, the waters of Santa Monica Bay are not inland waters.

In *Wilmington T. Co.* v. *Railroad Commission,* 166 Cal. 741, 742, 137 Pac. 1153, affirmed, 236 U.S. 151, the court recognized that a vessel traveling between Avalon, on Catalina Island, and San Pedro, "must travel for upward of twenty miles upon the high seas, outside of the territorial jurisdiction of this state." This Court, in affirming, agreed that (236 U.S. at 152) "The vessels of the plaintiff in error, in their direct passage between the ports named, must traverse the high seas for upwards of twenty miles."

In *In re Marincovich,* 48 Cal. App. 474, 480, 192 Pac. 156, the court held that the description of Fish and Game District 20 as embracing the "state waters" off a certain part of the island of Santa Catalina (see supra, p. 176) was not uncertain, since the state waters extended three miles from the islands. *Suttori* v. *Peckham,* 48 Cal. App. 88, 191 Pac. 960, reached the same conclusion.

Hooker v. *Raytheon Company,* 212 F. Supp. 687 (S.D. Cal.), held that the waters of the Santa Barbara Channel, more than three miles from the mainland or any island, were outside the State of California, and were "high seas" within the meaning of the Death on the High Seas Act, 46 U.S.C. 761–768.

The foregoing review demonstrates that there is no support for California's claim that the disputed areas have achieved historic status as inland waters.

C. THE LINE OF MEAN LOW WATER IS THE PROPER BASELINE FROM WHICH TO MEASURE CALIFORNIA'S THREE-MILE BELT OF SUBMERGED LANDS WHERE THE SHORE MEETS THE OPEN SEA

This Court's decree of October 27, 1947, 332 U.S. 804, fixed the dividing line between State and federal rights where the shore meets the open sea at the "ordinary low-water mark," and the Submerged Lands Act has likewise used the "line of ordinary low water" as the baseline from which to measure the three-mile belt of submerged land given to the State by that Act. Sec. 2(c), 67 Stat. 29, 43 U.S.C. 1301(c). It is of course natural that Congress should have used the same term, for the statutory grant was intended to begin where the State's constitutional right ended, without any overlapping or hiatus. Thus our question here remains the same as it was before the Special Master: to define the line of "ordinary low water."

It is generally agreed that "ordinary" as here used indicates mean or average; but the difficulty arises because on the California coast the tide is of what is known as the "mixed" type. That is, there are two

high tides and two low tides, of unequal height, each day. Thus the question is, whether the "ordinary" low tide is the average of *all* low tides, as the United States contends, or the average of the *lower* low tides, as California contends.

The Special Master ruled that "ordinary low water" should be understood as the mean of all low waters (Report, 39–44), and California has excepted to that ruling. Calif. Exceptions, No. VII, p. 10. We think that the same reasons which led the Court to hold in *Borax, Ltd.* v. *Los Angeles,* 296 U.S. 10, 26–27, that the landward limit of the State's tidelands is to be taken as the line of mean high tide, including both the higher high tides and the lower high tides, warrant adoption of the Special Master's conclusion here. In *Borax, Ltd.,* the Court could see no reason for excluding one or the other of the daily high tides; and similarly we see no reason here for excluding one of the daily low tides.

Mr. Harry A. Marmer, Assistant Chief of the Division of Tides and Currents, United States Coast and Geodetic Survey, a recognized authority on tides,[134] testified that while "ordinary low water" is not a technical expression, it would always be understood as meaning mean low water; that is, the mean of all low waters. Tr. 58. The same statement appears in a letter of February 8, 1952, from Rear Admiral R. F. A.

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[134] Mr. Marmer is the author of numerous books on the subject, including *Tides and Currents in New York Harbor; Coastal Currents Along the Pacific Coast of the United States; The Tide: Tidal Datum Planes; The Sea;* and *Chart Datums.* He has been called "the outstanding American authority on tidal phenomena." Carson, *The Sea Around Us,* p. 217.

Studds, Director of the United States Coast and Geodetic Survey, to Solicitor General Philip B. Perlman, printed in the Appendix to the Brief for the United States before the Special Master (filed June 6, 1952), pp. 181–188, at pp. 186–187:

> The term "ordinary" low water is not one which the Coast and Geodetic Survey has defined and standardized for survey operations and for technical engineering usage. But where the word "ordinary" is used in connection with tides, it is regarded as the equivalent of the word "mean."[2] Thus, "ordinary high water" is the same as "mean high water," and "ordinary low water" the same as "mean low water."
>
> [2] Tide and Current Glossary, Special Publication No. 228 (Revised 1949 edition), U.S. Coast and Geodetic Survey, p. 26.

This represents the natural meaning of the expression "ordinary low water," and we believe that in using that expression when this case was previously before it, the Court has already decided that the proper dividing line (now the proper baseline from which to measure the dividing line) is the line of the mean of all low waters. If we are mistaken in this, then we urge that the Court should now so hold.

California advances two closely related arguments to support the use of mean lower low water as the base line. Brief, 115–117. One is that mean lower low water is the datum plane[135] of the navigational charts

[135] That is, the level to which sounding depths shown on the chart are related. Thus, a sounding of six fathoms would indicate a depth of six fathoms below the level of mean lower low water.

for the Pacific Coast prepared by the United States Coast and Geodetic Survey; the other is that Article 3 of the Convention on the Territorial Sea and the Contiguous Zone identifies the line of low water to be used in locating the limits of territorial waters as that "marked on large-scale charts officially recognized by the coastal State." 106 Cong. Rec. 11174. Of course the reason for using mean lower low water on navigational charts is the practical one of showing the navigator the depth of water upon which he can count. Similarly, the reason for referring to published charts in the Convention is the practical one that navigators are the persons primarily interested in knowing where are the limits of the marginal sea; and the published charts are the source of information most likely to be available to them. These considerations do not affect the present case, where the line originally defined by the Court and subsequently adopted by Congress in the Submerged Lands Act has its origin not in navigational problems but in the common law concept of proprietary rights in tidelands. As to such rights, there is no reason to prefer the mean of the lower low waters over the mean of the higher low waters. The logical lower limit, like the logical higher limit, is the mean of all the turns of the tide.[136]

[136] California finds it significant that the United States has used mean lower low tide as the datum in applying the Submerged Lands Act to the coast of Louisiana (Brief, 118). It must be realized, however, that there is usually only one high and one low tide each day on the Louisiana coast. Days when there are two high and two low tides are relatively few, and in these circumstances it was considered impractical to try to take

There is no reason why the belt of submerged land granted to the States by the Submerged Lands Act needs to coincide with the belt of the nation's territorial sea. In fact, this Court has already held that they do not necessarily coincide. *United States* v. *Louisiana,* 363 U.S. 1, 36. Congress has fixed an independent measure of the grant, putting it at three miles from the line of "ordinary" low water; and the meaning of this expression should be determined from its history and its ordinary connotation. The situation is not comparable to the question of what are "inland waters," where we must look to the foreign relations policy of the nation to identify those waters because the term has no other meaning.

Questions of artificial harbor works and changes in the shore line created after May 22, 1953 (Calif. Brief, 113–114) are dealt with in the Amended Exceptions of the United States, pp. 16–26; and we need not repeat here what is said there about them.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the court should overrule the exceptions of the State of California to the Report of the Special Master; should sustain the exceptions of the United States and, as modified in accordance with the exceptions of the United States, approve and adopt the Report of the Special Master as a correct determination of the status (as inland waters or otherwise) of the areas to which it refers and as a correct declara-

account of the occasional higher low tides. This is no precedent for a coast where two unequal high and low tides occur daily. See Shalowitz, 1 *Shore and Sea Boundaries* (1962) 176, n. 158.

tion of the legal principles to be applied in this case in ascertaining the line of ordinary low water and the outer limit of inland waters for the purpose of identifying the boundary between the submerged lands granted to the State of California by the Submerged Lands Act and the submerged lands of the outer continental shelf retained by the United States; and should request each of the parties to submit a proposed form for the Court's decree carrying the opinion into effect.

The Court should retain jurisdiction for the purpose of such further proceedings as may be necessary.

Respectfully submitted,

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JUNE 1964.

APPENDIX A

1. UNITED STATES v. CALIFORNIA; ORDER AND DECREE, OCTOBER 27, 1947, 332 U.S. 804, 805.

* * * * *

And for the purpose of carrying into effect the conclusions of this Court as stated in its opinion announced June 23, 1947, it is ORDERED, ADJUDGED, AND DECREED as follows:

1. The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein.

* * * * *

2. SUBMERGED LANDS ACT, MAY 22, 1953, 67 STAT. 29, 43 U.S.C. 1301–1315.

AN ACT

To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries.

733-890—64——14

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Submerged Lands Act".

TITLE I

DEFINITION

SEC. 2 [43 U.S.C. 1301]. When used in this Act—

(a) The term "lands beneath navigable waters" means—

* * * * *

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

* * * * *

TITLE II

LANDS BENEATH NAVIGABLE WATERS WITHIN STATE BOUNDARIES

SEC. 3 [43 U.S.C. 1311]. RIGHTS OF THE STATES.—

(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to

State authority upon or within said lands and navigable waters; * * *.

* * * * *

SEC. 4 [43 U.S.C. 1312]. SEAWARD BOUNDARIES.—The seaward boundary of each original coastal State is hereby aproved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

SEC. 5 [43 U.S.C. 1313]. EXCEPTIONS FROM OPERATION OF SECTION 3 OF THIS ACT.—There is excepted from the operation of section 3 of this Act—

(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any per-

son in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for it own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

(c) all structures and improvements constructed by the United States in the exercise of its navigational servitude.

* * * * *

SEC. 9 [43 U.S.C. 1302]. Nothing in this Act shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 2 hereof, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed.

* * * * *

3. LETTER OF NOVEMBER 13, 1951, FROM JAMES E. WEBB, ACTING SECRETARY OF STATE, TO J. HOWARD McGRATH, AT-ATTORNEY GENERAL.

In reply to L/EUR.

DEPARTMENT OF STATE,
Washington, November 13, 1951.

MY DEAR MR. ATTORNEY GENERAL: Reference is made to your letter dated October 30, 1951, requesting a statement from the Department of State in regard to the position of the United States as to the principles or criteria which govern the delimitation of the territorial waters of the United States. You ask in particular how such delimitation is made in the case of:

(a) A relatively straight coast, with no special geographic features, such as indentations or bays;

(b) A coast with small indentations not equivalent to bays;

(c) Deep indentations such as bays, gulfs or estuaries;

(d) Mouths of rivers which do not form an estuary;

(e) Islands, rocks or groups of islands lying off the coast;

(f) Straits, particularly those situated between the mainland and offshore islands.

In the formulation of United States policy with respect to territorial waters and in the determination of the principles applicable to any problem connected therewith, such as the problem of delimiting territorial waters, the Department of State has been and is guided by generally accepted principles of international law and by the practice of other states in the matter.

(a) In the case of a relatively straight coast, with no special geographic features such as indentations or bays, the Department of State has traditionally taken the position that territorial

waters should be measured from the low water mark along the coast. This position was asserted as early as 1886 (The Secretary of State, Mr. Bayard, to Mr. Manning, Secretary of the Treasury, May 28, 1886, I Moore, *Digest of International Law,* 720). It was maintained in treaties concluded by the United States. (See Article 1 of the Convention concluded with Great Britain for the Prevention of Smuggling of Intoxicating Liquors on January 23, 1924, 43 Stat. 1761.) This position was in accord with the practice of other states. (See Article 2 of the Convention between Great Britain, Belgium, Denmark, France, Germany and the Netherlands for regulating the Police of the North Sea Fisheries signed at The Hague, May 6, 1882, 73 *British and Foreign State Papers,* 39, 41, and Article 2 of the Convention between Germany, Denmark, Estonia, Finland, France, the British Empire, Italy, Latvia, Poland and Sweden, relating to the Non-Fortification and Neutralization of the Aaland Islands, concluded at Geneva on October 20, 1921, 9 *League of Nations Treaty Series,* 212, 217.) The United States maintained the same position at the Conference for the Codification of International Law held at The Hague in 1930. (See League of Nations, Bases of Discussion for the Conference for the Codification of International Law, II, Territorial Waters, C. 74 M. 39, 1929, V., 143, hereinafter referred to as *Bases of Discussion.*) The report of the Second Sub-Committee adopted the low water mark as the base line for the delimitation of territorial waters. (League of Nations. Acts of the Conference for the Codification of International Law, III, Territorial Waters, C. 351 (b) M. 145 (b), 1930, V., 217, hereinafter referred to as *Acts of Conference.*)

(b) The Department of State has also taken the position that the low water mark along the coast should prevail as the base line for the

delimitation of territorial waters in the case of a coast with small indentations not equivalent to bays: the base line follows the indentations or sinuosities of the coast, and is not drawn from headland to headland. This position was already established in 1886. (See the letter from the Secretary of State Mr. Bayard to Mr. Manning, Secretary of the Treasury, dated May 28, 1886, *supra.*) The United States maintained this position at the Hague Conference of 1930. (See Amendments to Bases of Discussion proposed by the United States, *Acts of Conference,* 197.) The principle that all points on the coast should be taken into account in the delimitation of territorial waters was adopted in the report of the Second Sub-Committee (*Acts of Conference,* 217).

(c) The determination of the base line in the case of a coast presenting deep indentations such as bays, gulfs, or estuaries has frequently given rise to controversies. The practice of states, nevertheless, indicates substantial agreement with respect to bays, gulfs or estuaries no more than 10 miles wide: the base line of territorial waters is a straight line drawn across the opening of such indentations, or where such opening exceeds 10 miles in width, at the first point therein where their width does not exceed 10 miles. (See Article 2 of the Convention between Great Britain, Belgium, Denmark, France, Germany and the Netherlands, for regulating the Police of the North Sea Fisheries, signed at The Hague, May 6, 1882, 73 *Foreign and British State Papers,* 39, 41; The North Atlantic Coast Fisheries Arbitration between the United States and Great Britain of September 7, 1910; *U.S. Foreign Rel.,* 1910 at 566; and the Research in International Law of the Harvard Law School, 23 American Journal of International Law, SS, 266.)

Subject to the special case of historical bays, the United States supported the 10 mile rule at the Conference of 1930 (*Acts of Conference,* 197–199) and the Second Sub-Committee adopted the principle on which the United States relied (*Acts of Conference,* 217–218). It was understood by most delegations that, as a corollary to the adoption of this principle, a system would be evolved to assure that slight indentations would not be treated as bays (*Acts of Conference,* 218). The United States proposed a method to determine whether a particular indentation of the coast should be regarded as a bay to which the 10 mile rule would apply (*Acts of Conference,* 197–199). The Second Sub-Committee set forth the American proposal and a compromise proposal offered by the French delegation in its report, but gave no opinion regarding these systems (*Acts of Conference,* 218–219).

(d) With respect to mouths of rivers which do not flow into estuaries, the Second Sub-Committee agreed to take for the base line a line following the general direction of the coast and drawn across the mouth of the river, whatever its width (*Acts of Conference,* 220).

(e) With respect to the measurement of territorial waters when rocks, reefs, mudbanks, sandbanks, islands or groups of islands lie off the coast, the United States took the position at the Conference that separate bodies of land which were capable of use should be regarded as islands, irrespective of their distance from the mainland, while separate bodies of land, whether or not capable of use, but standing above the level of low tide, should be regarded as islands if they were within three nautical miles of the mainland. Each island, as defined, was to be surrounded by its own belt of territorial waters measured in the same manner as in the case of the mainland (*Acts of Conference,* 200).

The report of the Second Sub-Committee defined an island as a separate body of land, surrounded by water, which was permanently above high water mark, and approved the principle that an island, so defined, had its own belt of territorial sea (*Acts of Conference,* 219). While the Second Sub-Committee declined to define as islands natural appendages of the sea-bed which were only exposed at low tide, it agreed, nevertheless, that such appendages, provided they were situated within the territorial sea of the mainland, should be taken into account in delimiting territorial waters (*Acts of Conference,* 217).

(f) The problem of delimiting territorial waters may arise with respect to a strait, whether it be a strait between the mainland and offshore islands or between two mainlands. The United States took the position at the Conference that if a strait connected two seas having the character of high seas, and both entrances did not exceed six nautical miles in width, all of the waters of the strait should be considered territorial waters of the coastal state. In the case of openings wider than six miles, the belt of territorial waters should be measured in the ordinary way (*Acts of Conference,* 200–201). The report of the Second Sub-Committee supported this position with the qualification that if the result of this determination of territorial waters left an area of high sea not exceeding two miles in breadth surrounded by territorial sea, this area could be assimilated to the territorial sea (*Acts of Conference,* 220).

The Second Sub-Committee specified in its observations on this subject that the waters of a strait were not to be regarded as inland waters, even if both belts of territorial waters and both shores belonged to the same state (*Acts of Conference,* 220). In this, it supported the policy of the United States to oppose claims to exclu-

sive control of such waters by the nation to which the adjacent shore belonged. (The Secretary of State, Mr. Evarts, to the American Legation, Santiago, Chile, January 18, 1879, in connection with passage through the Straits of Magellan, I Moore, *Digest of International Law,* 664.) With respect to a strait which is merely a channel of communication to an inland sea, however, the United States took the position, with which the Second Sub-Committee agree, that the rules regarding bays should apply (*Acts of Conference,* 201, 220).

In connection with the principles applicable to bays and straits, it should be noted that they have no application with respect to the waters of bays, straits, or sounds, when a state can prove by historical usage that such waters have been traditionally subjected to its exclusive authority. The United States specifically reserved this type of case at the Hague Conference of 1930 (*Acts of Conference,* 197).

The principles outlined above represent the position of the United States with respect to the criteria properly applicable to the determination of the base line of territorial waters and to the demarcation between territorial waters and inland waters.

Sincerely yours,

JAMES E. WEBB,
Acting Secretary.

The Honorable J. HOWARD MCGRATH,
Attorney General.

4. LETTER OF FEBRUARY 12, 1952, FROM DEAN ACHESON, SECRETARY OF STATE, TO J. HOWARD McGRATH, ATTORNEY GENERAL.

In reply refer to L/EUR.

DEPARTMENT OF STATE,
Washington, February 12, 1952.

MY DEAR MR. ATTORNEY GENERAL: Reference is made to your letter of January 22, 1952, inquiring whether, in the light of the decision of

the International Court of Justice in the Fisheries Case (*United Kingdom* v. *Norway*) in date of December 18, 1951, the Department adheres to the statement of position given at your request on November 13, 1951, with respect to the principles or criteria governing the delimitation of the territorial waters of the United States.

The Department noted the holding of the Court that the Norwegian Government in fixing the base lines for the delimitation of Norwegian fisheries by applying the straight base lines method had not violated international law, especially in view of the peculiar geography of the Norwegian coast and of the consolidation of this method by a constant and sufficiently long practice.

The decision of the Court, however, does not indicate, nor does it suggest, that other methods of delimitation of territorial waters such as that adopted by the United States are not equally valid in international law. The selection of baselines, the Court pointed out, is determined on the one hand by the will of the coastal state which is in the best position to appraise the local conditions dictating such selection, and on the other hand by international law which provides certain criteria to be taken into account such as the criteria that the drawing of baselines must not depart to any appreciable extent from the general direction of the coast, that the inclusion within those lines of sea areas surrounded or divided by land formations depends on whether such sea areas are sufficiently closely linked to the land domain to be subject to the regime of internal waters, and that economic interests should not be overlooked the reality and importance of which are clearly evidenced by long usage.

In the view of the Department, the decision of the International Court of Justice in the Fisheries Case does not require the United

States to change its previous position with respect to the delimitation of its territorial waters. It is true that some of the principles on which this United States position has been traditionally predicated have been deemed by the Court not to have acquired the authority of a general rule of international law. Among these are the principle that the base line follows the sinuosities of the coast and the principle that in the case of bays no more than 10 miles wide, the base line is a straight line across their opening. These principles, however, are not in conflict with the criteria set forth in the decision of the International Court of Justice. The decision, moreover, leaves the choice of the method of delimitation applicable under such criteria to the national state. The Department, accordingly, adheres to its statement of the position of the United States with respect to delimitation of its territorial waters in date of November 13, 1951.

Sincerely yours,

DEAN ACHESON.

The Honorable J. HOWARD MCGRATH,
Attorney General.

5. LETTER OF MAY 28, 1886, FROM THOMAS F. BAYARD, SECRETARY OF STATE, TO DANIEL MANNING, SECRETARY OF THE TREASURY, 1 MOORE, DIGEST OF INTERNATIONAL LAW (1906), PP. 718–721.

It being desirable that there should be an agreement between the several Departments of our Government as to the limits of territorial waters on our northeastern and northwestern coasts, I have the honor to submit to you the following statement of the law on this important question as held in the Department of State. What I have here to communicate bears, so far as concerns the Department over which you preside, on our own claim to a jurisdiction over territorial waters on the

northwest coast beyond the three-mile zone. We resist this claim when advanced against us on the northeastern coast. What is now submitted to you is the question whether the principle thus asserted by us does not preclude us from setting up an extension, beyond this limit of our marine jurisdiction in the northwest.

In a letter by Mr. Jefferson, when Secretary of State on November 8, 1793, to the minister of Great Britain, and in a circular of November 10, 1793, to the United States district attorneys, the limit of one sea-league from shore was provisionally adopted by him as that of the territorial seas of the United States. The same position was taken by Mr. Pickering, Secretary of State, on September 2, 1796; by Mr. Madison, Secretary of State, Feby. 3, 1807; By Mr. Webster, Secretary of State, August 1, 1842; by Mr. Seward, Secretary of State, December 16, 1862; August 10, 1863, Sept. 16, 1864; and by Mr. Fish, Secretary of State, December 1, 1875.

In a note from Mr. Fish to Sir Edward Thornton, dated Jan. 22, 1875, it is expressly stated in reply to inquiries from the British foreign office "that this Government has uniformly, under every administration, objected to the pretension of Spain" to a six-mile limit. Mr. Fish proceeds to show that the United States statute, giving the right to board vessels within four leagues of the coast, is applied only to vessels coming to United States ports, and that the extension of the boundary line, between the United States and Mexico, to three leagues from land, by the treaty of Guadalupe Hidalgo, applies only to Mexico and the United States.

Mr. Evarts, writing to Mr. Fairchild, then our representative in Spain on March 3, 1881 (Foreign Relations, 1881) said: "This Government must adhere to the three-mile rule as the

jurisdictional limit, and the cases of visitation *without that line* seem not to be excused or excusable under that rule."

Whether the line which bounds seaward the three-mile zone follows the indentations of the coast or extends from headland to headland is the question next to be discussed.

The headland theory, as it is called, has been uniformly rejected by our Government, as will be seen from the opinions of the Secretaries above referred to. The following additional authorities may be cited on this point:

President Woolsey makes the following comment on the "headland" claim: "But such broad claims have not, it is believed, been much urged, and they are out of character for a nation that has ever asserted the freedom of doubtful waters as well as contrary to the spirit of more recent times."

In an opinion of the umpire of the London commission of 1853, it was held that: "It can not be asserted as a general rule, that nations have an exclusive right of fishery over all adjacent waters to a distance of three marine miles beyond an imaginary line drawn from headland to headland."

This doctrine is new and has received a proper limit in the convention between France and Great Britain of the 2d of August, 1839, in which it is equally agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland. Cited Halifax Commission, page 152. In the same volume, page 155, it is stated that on May 14, 1870, the ten-mile-headland doctrine having been reasserted by Mr. Peter Mitchell, provincial minister of marine and fisheries, Lord Granville, British foreign secretary, on June 6,

1870, telegraphed to the governor-general as follows: "Her Majesty's Government hopes that the United States fishermen will not be, for the present, prevented from fishing, except within three miles from land or in bays which are less than six miles broad at the mouth."

We may therefore regard it as settled that, so far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign.

The position I here state, you must remember, was not taken by this Department speculatively. It was advanced in periods when the question of peace or war hung on the decision. When, during the three earlier administrations, we were threatened on our coast by Great Britain and France, war being imminent with Great Britain, and for a time actually though not formally engaged in with France, we asserted this line as determining the extent of our territorial waters. When we were involved, in the earlier part of Mr. Jefferson's Administration, in difficulties with Spain, we then told Spain that we conceded to her, so far as concerned Cuba, the same limit of territorial waters as we claimed for ourselves, granting nothing more; and this limit was afterwards reasserted by Mr. Seward during the late civil war, when

there was every inducement on our part not only to oblige Spain, but to extend, for our own use as a belligerent, territorial privilege. When, in 1807, after the outrage on the *Chesapeake* by the *Leopard,* Mr. Jefferson issued a proclamation excluding British men-of-war from our territorial waters, there was the same rigor in limiting these waters to three miles from shore. And during our various fishery negotiations with Great Britain we have insisted that beyond the three-mile line British territorial waters on the northeastern coast do not extend. Such was our position in 1783, in 1794, in 1815, in 1818. Such is our position now in our pending controversy with Great Britain on this important issue. It is true that there are qualifications to this rule, but these qualifications do not affect its application to the fisheries. We do not, in asserting this claim, deny the free right of vessels of other nations to pass, on peaceful errands, through this zone, provided they do not by loitering produce uneasiness on the shore or raise a suspicion of smuggling. Nor do we hereby waive the right of the sovereign of the shore to require that armed vessels, whose projectiles, if used for practice or warfare, might strike the shore, should move beyond cannon range of the shore when engaged in artillery practice or in battle, as was insisted on by the French Government at the time of the fight between the *Kearsarge* and the *Alabama,* in 1864, off the harbor of Cherbourg. We claim also that the sovereign of the shore has the right, on the principle of self defence, to pursue and punish marauders on the sea to the very extent to which their guns would carry their shot, and that such sovereign has jurisdiction over crimes committed by them through such shot, although at the time of the shooting they were beyond three miles from shore. But these qualifications do not in any way affect the principle I

738-890—64——15

now assert, and which I am asserting and pressing in our present contention with Great Britain as to the northeastern fisheries. From the time when European fishermen first visited the great fisheries of the northeastern Atlantic, these fisheries, subject to the territorial jurisdiction above stated, have been held open to all nations; and even over the marine belt of three miles the jurisdiction of the sovereign of the shore is qualified by those modifications which the law of necessity has wrought into international law. Fishing boats or other vessels, traversing those rough waters, have the right, not merely of free transit of which I have spoken, but of relief, when suffering from want of necessaries, from the shore. There they may go by the law of nations, irrespective of treaty, when suffering from want of water, or of food or even of bait, when essential to the pursuit of a trade which is as precarious and as beset with disasters as it is beneficent to the population to whom it supplies a cheap and nutritious food. These rights we insist on being conceded to our fishermen in the northeast, where the mainland is under the British sceptre. We cannot refuse them to others on our northwest coast, where the sceptre is held by the United States. We asserted them, as is seen by Mr. Fish's instruction, above quoted of December 1, 1875, against Russia, thus denying to her jurisdiction beyond three miles on her own marginal seas. We can not claim greater jurisdiction against other nations, of seas washing territories which we derived from Russia under the Alaska purchase.

APPENDIX B

LEGISLATION ESTABLISHING THE BOUNDARIES OF CALIFORNIA'S COASTAL COUNTIES

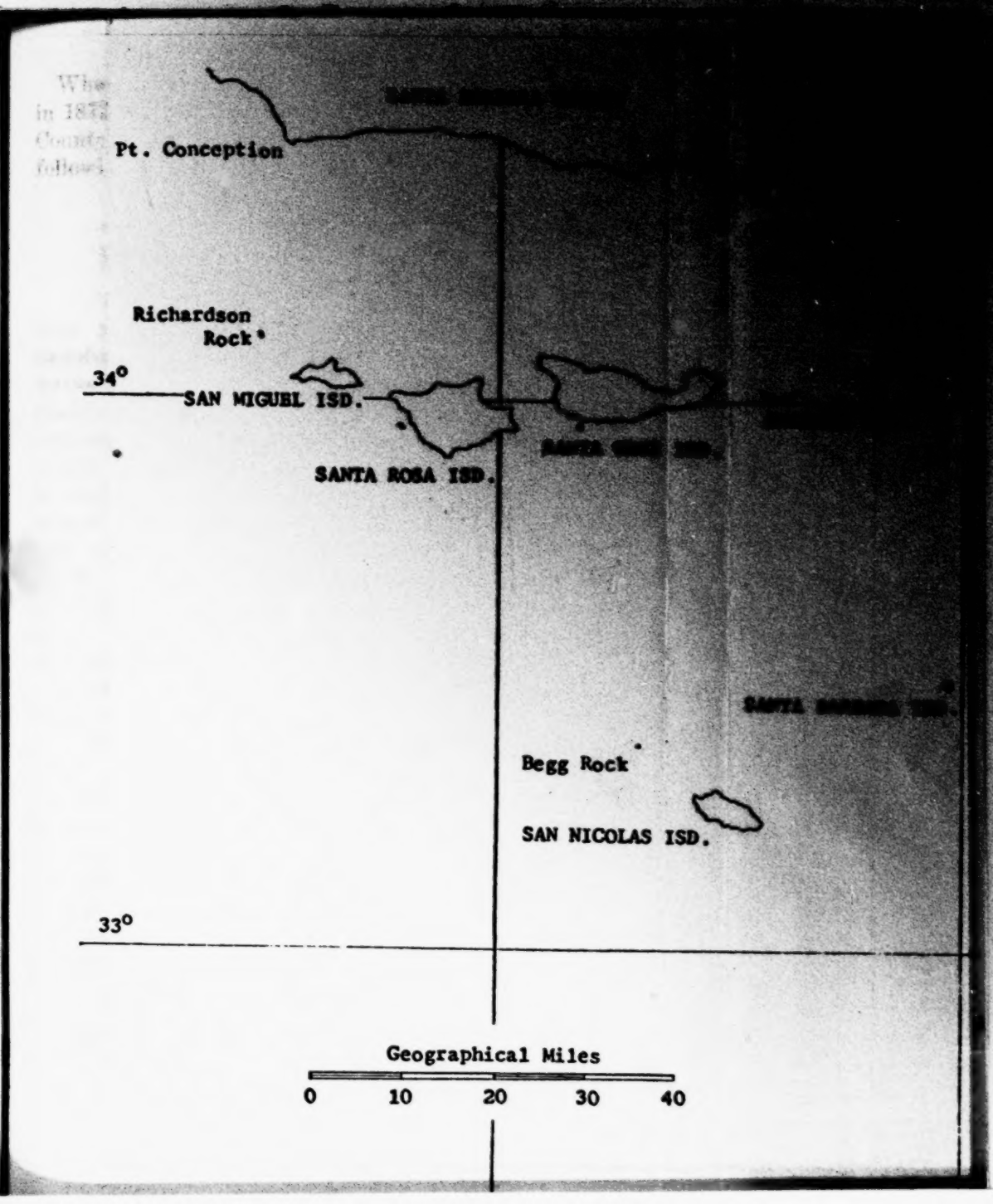
We set forth here an analysis of California legislation describing the seaward boundaries of the five southern coastal counties (San Diego, Orange, Los Angeles, Ventura, and Santa Barbara) from the date of the State's admission to the Union, 1850, to the present. Since these seaward boundaries of the counties coincide with the seaward boundaries of the State,[1] the legislation affords a direct indication of the extent of the State's historical claim to sovereignty over the waters off its shores. It is clear from the legislation that the Legislature has always understood that the State boundary is three miles from the mainland; that the islands are separate adjuncts and not embraced within a boundary extending out from the mainland, as California now claims; and that, contrary to California's present contention, the inland waters of San Pedro Bay extend, at the most, no farther east than a point opposite the eastern end of the present breakwater. As an aid to understanding the geographic points referred to in the legislation, we have prepared the sketch map opposite page 20a, on

[1] In some enactments the Legislature made this coincidence explicit. *E.g.*, 1919 redescription of the boundaries of San Diego County. Calif. Political Code, § 3945, Calif. Stats. 1919, c. 470, § 38, p. 895. Where that is not explicit, it is necessarily implied in view of the Legislature's constitutional obligation to divide the entire State, including its coastal waters, into counties. *Ocean Industries* v. *Superior Court*, 200 Cal. 235, 243–244, 252 Pac. 722.

which the shore termini of the Mexican border and of the county boundaries have been designated "A," "B," "C," "D" and "E." Since the upland portions of the boundaries are for present purposes irrelevant, we omit all reference to them beyond identifying their shore termini and indicating whether the description proceeded in a clockwise or counterclockwise direction. The map and discussion are based on the cited legislation, on U.S. Exhibits J(1), J(2), and J(3) (identified at Tr. 1277, 1289, and 1294, respectively; admitted at Tr. 1298), and on the testimony of Mr. A. J. Wraight, a geographer and cartographer with the United States Coast and Geodetic Survey (Tr. 1272-1299).

San Diego County.—San Diego, the southernmost coastal county, was first described (Calif. Stats. 1850, c. 15, § 2, p. 58) as "Commencing on the coast of the Pacific, at the mouth of the creek called San Mateo" ("B" on the sketch map) and proceeding clockwise to and along the Mexican border "to the Pacific Ocean ["A" on the map], and three English miles therein; thence in a northwesterly direction, running parallel with the coast, to a point due west of the mouth of the creek San Mateo, and thence due east to the mouth of said creek, which was the place of beginning." In the following year, that was reworded even more specifically (Calif. Stats. 1851, c. 14, § 2, p. 172): "Commencing on the coast of the Pacific at San Mateo point" ("B") [2] and proceeding clockwise as before "to the Pacific Ocean ["A"], and three miles therein; thence in a north-westerly direction running parallel with the coast, to *three miles due west from San Mateo point;* thence east to the place of beginning ["B"]." (Emphasis added.)

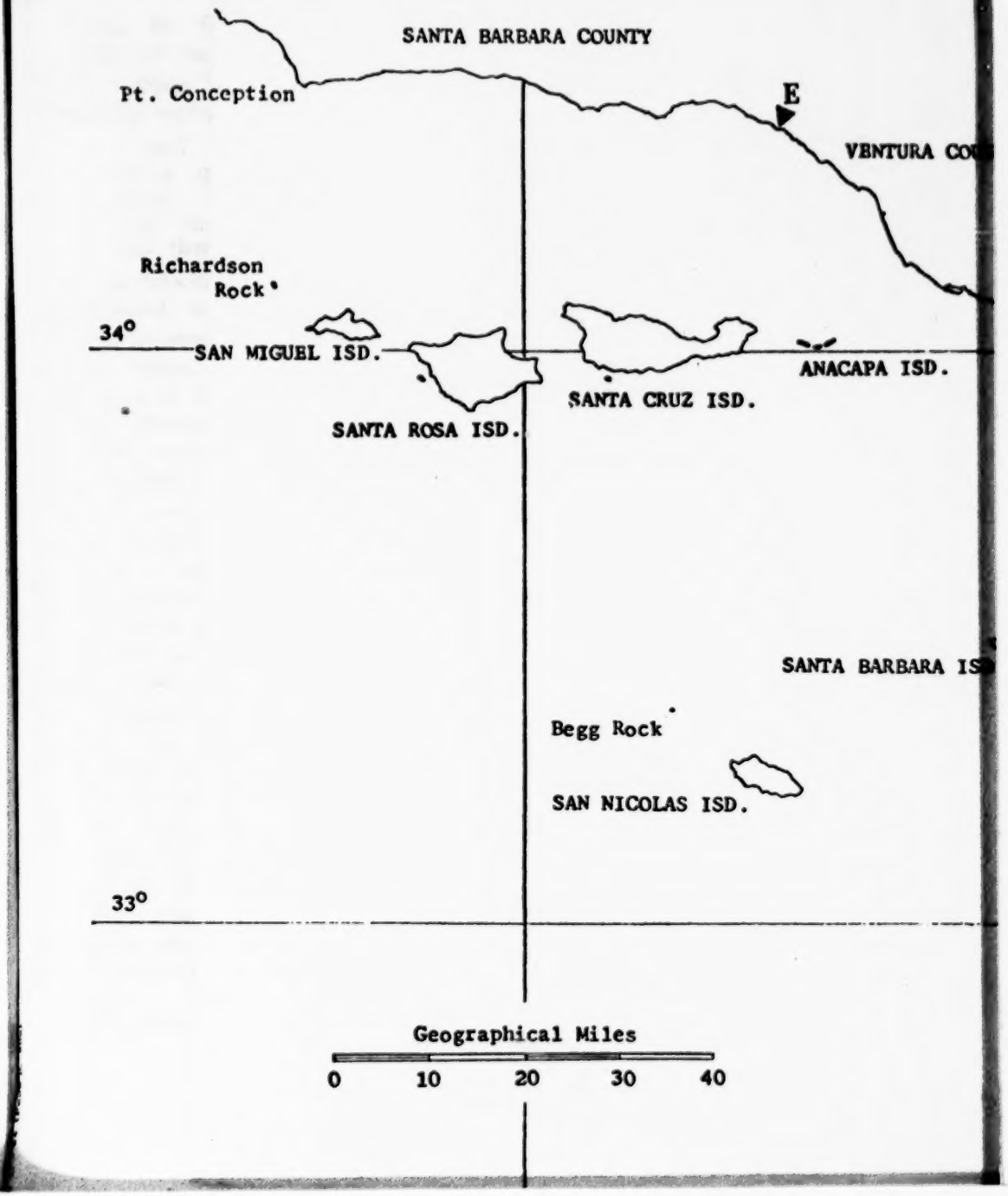
[2] Not significantly different from the mouth of San Mateo Creek. See U.S. Exh. J(1), and Tr. 1279.

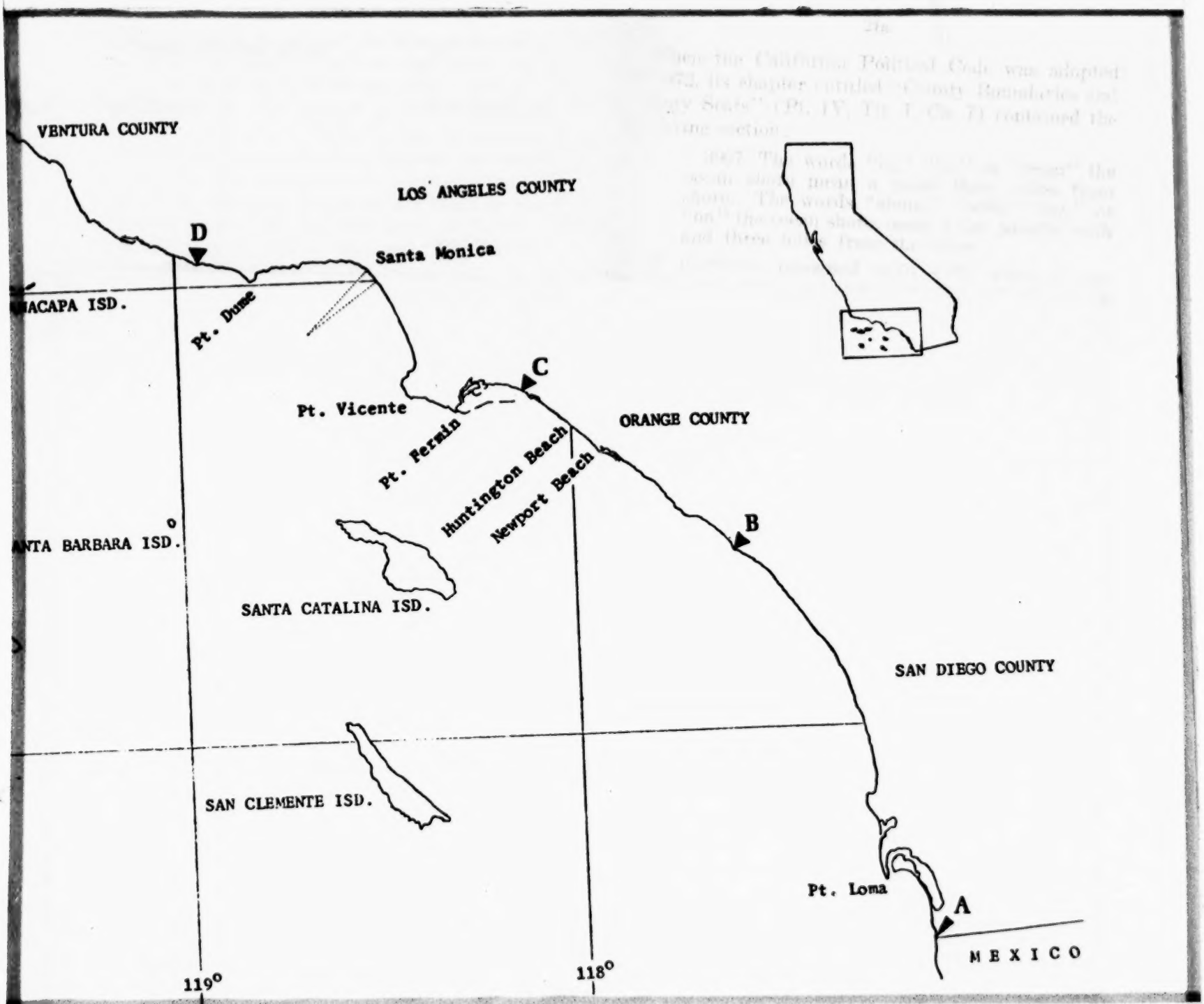


which the shore termini of the Mexican border and of the county boundaries have been designated "A," "B," "C," "D" and "E." Since the upland portions of the boundaries are for present purposes irrelevant, we omit all reference to them beyond identifying their shore termini and indicating whether the description proceeded in a clockwise or counterclockwise direction. The map and discussion are based on the cited legislation, on U.S. Exhibits J(1), J(2), and J(3) (identified at Tr. 1277, 1289, and 1294, respectively; admitted at Tr. 1298), and on the testimony of Mr. A. J. Wraight, a geographer and cartographer with the United States Coast and Geodetic Survey (Tr. 1272–1299).

San Diego County.—San Diego, the southernmost coastal county, was first described (Calif. Stats. 1850, c. 15, § 2, p. 58) as "Commencing on the coast of the Pacific, at the mouth of the creek called San Mateo" ("B" on the sketch map) and proceeding clockwise to and along the Mexican border "to the Pacific Ocean ["A" on the map], and three English miles therein; thence in a northwesterly direction, running parallel with the coast, to a point due west of the mouth of the creek San Mateo, and thence due east to the mouth of said creek, which was the place of beginning." In the following year, that was reworded even more specifically (Calif. Stats. 1851, c. 14, § 2, p. 172): "Commencing on the coast of the Pacific at San Mateo point" ("B")[2] and proceeding clockwise as before "to the Pacific Ocean ["A"], and three miles therein; thence in a north-westerly direction running parallel with the coast, to *three miles due west from San Mateo point;* thence east to the place of beginning ["B"]." (Emphasis added.)

[2] Not significantly different from the mouth of San Mateo Creek. See U.S. Exh. J(1), and Tr. 1279.




VENTURA COUNTY
LOS ANGELES COUNTY
D
Santa Monica
ACAPA ISD.
Pt. Dume
C
Pt. Vicente
Pt. Fermin
ORANGE COUNTY
Huntington Beach
Newport Beach
B
NTA BARBARA ISD.
SANTA CATALINA ISD.
SAN DIEGO COUNTY
SAN CLEMENTE ISD.
Pt. Loma
A
MEXICO
119°
118°

When the California Political Code was adopted in 1872, its chapter entitled "County Boundaries and County Seats" (Pt. IV, Tit. I, Ch. I) contained the following section:

> 3907. The words "in," "to," or "from" the ocean shore mean a point three miles from shore. The words "along," "with," "by," or "on" the ocean shore, mean a line parallel with and three miles from the shore.

That provision remained until 1947, when it was transferred, without substantial change, to the California Government Code, as section 23075 thereof (Calif. Stats. 1947, c. 424, p. 1041). The seaward boundary of San Diego County was described in 1872 (Calif. Political Code, 1872, § 3944) as "Beginning at south corner of Los Angeles in the Pacific Ocean, opposite San Mateo Point" ("B"), proceeding clockwise to and along the Mexican border "into the Pacific Ocean ["A"]; thence northerly to place of beginning." In view of section 3907, *supra,* this language clearly put the boundary three miles from shore at each end.

In 1919 the county was redescribed (Calif. Political Code, § 3945, Calif. Stats. 1919, c. 470, § 38, p. 895) as "Beginning at the southwest corner of the State" and proceeding counterclockwise to and "southerly along said westerly line of said Rancho Santa Margarita y Las Flores to the shore line of the Pacific ocean ["B"], and continuing in the same direction[3] to a point *three English miles in said Pacific ocean, which point is on the westerly boundary line of the said State of California;* thence *southerly along said westerly boundary line of the State of California* to the place of beginning." (Em-

[3] Approximately southwest. See U.S. Exh. J(1), and Tr. 1278–1279.

phasis added.) That was repeated in 1923 (Calif. Stats. 1923, c. 160, § 38, p. 361) and in 1947 (Calif. Government Code, 1947, § 23137; Calif. Stats. 1947, c. 424, p. 1069), and remains in effect today. This description makes explicit the coincidence of the State and county boundaries.

These descriptions of San Diego County are plainly irreconcilable with California's present claim of a State boundary running from Point Loma almost due west more than 55 miles to San Clemente Island, then approximately west 15° north more than 40 miles to San Nicolas Island, then northerly toward Santa Cruz Island and west and north around Santa Rosa and San Miguel Islands to Point Conception.

Orange County.—Orange County, immediately north of San Diego County, was carved out of Los Angeles County in 1889. It was described (Calif. Stats. 1889, c. 110, § 2, p. 123) as "Beginning at a point in the Pacific Ocean *three miles southwest of the center of the mouth of Coyote Creek* ["C" on our map], proceeding up said creek" and clockwise to the boundary line of San Diego County, "thence along said line southwest until it reaches the Pacific Coast ["B"]; thence in the same direction to a point *three miles in said Pacific Ocean;* thence in *northwesterly line parallel to said coast* to the point of beginning." (Emphasis added.) In 1919 Orange County was redescribed (Calif. Political Code, § 3938, Calif. Stats. 1919, c. 470, § 31, p. 888) as "Beginning at the northwest corner of San Diego county" and proceeding counterclockwise "to a point on the northeasterly line of block fifty-nine, Alamitos bay tract ["C"] as shown on map recorded in map book 5, page 137, on file in the office of the recorder of the county of Los Angeles, distant thereon south fifty-seven degrees, fifty minutes, forty-five seconds east, a distance of

four hundred twenty-eight and ninety-one one hundredths feet from the most northerly corner of said block fifty-nine;[4] thence continuing south thirty-three degrees, zero minutes, zero seconds west, *a distance of three miles, more or less to the southwesterly boundary line of the State of California* * * *; thence *southeasterly by state line* to point of beginning." (Emphasis added.) That was repeated in 1923 (Calif. Stats. 1923, c. 160, § 31, p. 354) and 1947 (Calif. Government Code, 1947, § 23130; Calif. Stats. 1947, c. 424, p. 1063), and is still in effect.

These descriptions of Orange County clearly fix the State boundary as three miles from the mainland shore, along the entire length of the county ("B" to "C"). This not only disproves any claim to the "overall unit area," but—what is more significant—it proves that the eastern "headland" of San Pedro Bay cannot be farther east than point "C". This necessarily follows from the fact that the State boundary was explicitly identified as being three miles from "C", which means that the baseline must be on shore at "C".

Los Angeles County.—Los Angeles County (which until 1889 included what is now Orange County) was originally described (Calif. Stats. 1850, c. 15, § 3, p. 59) as "Beginning on the coast of the Pacific at the southern boundary of the farm called Trumfo" ("D" on our map), and proceeding clockwise to San Mateo Creek, "thence down said creek San Mateo to the coast ["B"] and *three English miles into the sea; thence in a northwesterly direction parallel with the coast to a point three miles from land* and opposite to the southern boundary of the farm called Trumfo; and thence to the shore at said boundary ["D"], which was the

[4] U.S. Exh. No. X-7 for identification is a copy of the tract map referred to. See Tr. 1282–1283.

point of beginning, including the islands of Santa Catalina and San Clement." (Emphasis added.) It is clear that a boundary running from three miles seaward of "B", "in a northwesterly direction parallel with the coast to a point three miles from land" opposite "D" could not run around San Clemente and Catalina Islands. Necessarily, the provision for "including" those islands meant that they were included in the county, but separately and not within the described boundary.

The description of 1851 (Calif. Stats. 1851, c. 14, § 3, p. 172) was essentially no different and a new description in 1856 (Calif. Stats. 1856, c. 46, § 1, p. 53) sheds no particular light on the present question. The codification of 1872 described the boundary (Calif. Political Code, 1872, § 3945) as beginning "in the Pacific Ocean" near point "D", proceeding clockwise to the northwest corner of San Diego County "in Pacific Ocean; thence northwesterly, along ocean shore to place of beginning; including the Islands of Santa Catalina, San Clement, and the islands off the coast included in Los Angeles County." In view of the definitions adopted by § 3907 in the same codification (*supra,* p. 21a), this likewise described a line paralleling the shore at a distance of three miles.

In 1919 the Legislature adopted a new description of Los Angeles County, which was subsequently held to be unconstitutional because it transferred land from Ventura County to Los Angeles County without being a "general law" as required by a 1910 amendment to the State Constitution. *Mundell* v. *Lyons,* 182 Cal. 289, 187 Pac. 950. Nevertheless, the 1919 description affords a most revealing insight into the Legislature's view as to the location of the State boundary. It described the boundary (Calif. Stats.

1919, c. 470, p. 877) as "Beginning at the intersection of the *southwesterly boundary line of the State of California* with a line drawn normal to the shore of the Pacific ocean" from a specified corner (which is on the shore about 10 miles west of "D"; see U.S. Exh. J(1), and Tr. 1287–1288); "thence northerly in a straight line *three miles*" to the named corner, and continuing clockwise to and "along the northern line of Orange county * * * to the southwesterly boundary line of the State of California; thence northwesterly along the southwesterly boundary line of the State of California to the point of beginning; also including the islands of Santa Catalina and San Clemente *with the adjacent waters three miles from shore.*" (Emphasis added.) Certainly at this time the Legislature was not asserting jurisdiction over waters more than three miles from the mainland or from each island.

In 1923 the description was amended (Calif. Political Code, § 3927; Calif. Stats. 1923, c. 160, § 20, p. 343) to describe Los Angeles County as "Beginning at a point in the southwesterly boundary line of the State of California" (opposite "D" on our map) and proceeding clockwise to and along the northern boundary of Orange County "to the southwesterly boundary line of the State of California; thence northwesterly along the southwesterly boundary line of the State of California to the point of beginning. *Also the islands of Santa Catalina and San Clemente.*" (Emphasis added.) The same language is included in Calif. Government Code, § 23119 (Calif. Stats. 1947, c. 424, p. 1055) by which Los Angeles County is now defined.

It is evident from the foregoing that the Legislature has consistently regarded the State boundary as runing three miles from the mainland shore, and the

islands as being separate adjuncts with their own marginal belts.

Ventura County.—Ventura County was carved out of the eastern end of Santa Barbara County in 1872, and was first described (Calif. Stats. 1871–72, c. 351, p. 484) as "Commencing on the coast of the Pacific Ocean, at the mouth of the Rincon Creek" ("E" on our map; see U.S. Exh. J(2), and Tr. 1289–1290) and proceeding clockwise to and along the boundary of Los Angeles County "to the Pacific Ocean ["D"] and three miles therein; thence in a northwesterly direction to a point due south of and three miles distant from the center of the mouth of Rincon Creek; thence north to the point of beginning, and including the Islands of Anacapa and San Nicholas." The same language was used in the unconstitutional 1919 revision, Calif. Stats. 1919, c. 470, § 57, p. 908;[5] in 1923, Calif. Political Code, § 3964, Calif. Stats. 1923, c. 160, § 57, p. 373; and in the present Calif. Government Code, § 23156, Calif. Stats. 1947, c. 424, p. 1078.

As can be seen from our map, it would indeed be extraordinary to describe a line from "D" around San Nicolas and Anacapa Islands to "E" as proceeding from "D" three miles into the ocean, and "thence in a northwesterly direction" as the Ventura County boundary is described. In fact, such a line would have to go from "D" *south*westerly more than 50 miles. A more serious difficulty is that Santa Barbara County includes Santa Barbara Island in similar terms. If each county boundary were extended to include its islands, one would cross over the other, since Santa Barbara County is to the west, but

[5] The signification of the language was somewhat different in 1919, in that the Los Angeles County boundary there referred to was, of course, the boundary as unconstitutionally moved by the same Act. See *supra*, p. 24a.

Santa Barbara Island is east of a line between the Ventura County mainland and San Nicolas Island. See U.S. Exh. J(2), and Tr. 1290–1291.

Santa Barbara County.—Santa Barbara County originally included what is now Ventura County, and was first described (Calif. Stats. 1850, c. 15, § 4, p. 59) as "Beginning on the sea coast" some miles north of Point Conception, and proceeding clockwise to Los Angeles County and "along the northwest boundary of said county to the ocean ["D"], and three English miles therein; and *thence in a northwesterly direction, parallel with the coast,* to a point due west of the mouth of Santa Maria creek; thence due east to the mouth of said creek, which was the place of beginning, including the islands of Santa Barbara, San Nicholas, San Miguel, Santa Rosa, Santa Cruz, and all others in the same vicinity." (Emphasis added.)

California dismisses this description as having "shed no particular light on the boundary problem." Calif. Brief, 60. However, the direction to proceed from "D" three miles into the ocean, and then northwest, is extremely pertinent to the validity of the State's claim to the Santa Barbara Channel. To enclose Santa Barbara Island, as California would have the line do, it must go from "D" almost due *south* more than 30 miles, then southwest another 25 or more to take in San Nicolas. Why would such a line be described as proceeding into the ocean only *three* miles, and then *northwest,* parallel with the coast? Moreover, why would the three-mile belt be provided for *before* encircling the islands? If California were right, the three-mile belt should come seaward of the islands, not at the mainland shore.

The 1851 revision of the description of Santa Barbara County was not materially different from the foregoing. Calif. Stats. 1851, c. 14, § 4, p. 173. In

1852 the description was again revised, as quoted by California (Calif. Stats. 1852, c. 133, p. 218; Brief 61). The phrase "parallel with the coast" was omitted, and the enumeration of the islands was inserted immediately following the words "to the Ocean, and three miles therein; thence in a northwesterly direction, including the Islands" etc. While this change gives slightly more plausibility to California's contention that a continuous line was to run from "D" around the named islands and back to shore, that construction is still subject to the difficulties that a line from three miles off point "D" around the islands runs *south* rather than *northwest,* and that the Legislature put the three-mile belt at the shore rather than outside the islands. It might be suggested that the instruction to go "in a northwesterly direction" referred only to the ultimate destination. However, it is virtually impossible to attribute such looseness in overlooking a detour of nearly 60 miles to the south to a Legislature which meticulously directed the boundary was to proceed into the ocean "three miles." Why mention three miles if one is to go more than fifty in the same direction? These incongruities, coupled with the prior and subsequent history of this and other counties, discredit California's interpretation.

In 1872 Santa Barbara County was redescribed, proceeding in the opposite direction from the western corner of Los Angeles County ["D"] north and west "to a point in the Pacific Ocean opposite the mouth of" a specified creek, "thence southeasterly, by the ocean shore, to the place of beginning, including the Islands of Santa Barbara, San Nicolas, San Miguel, Santa Rosa, and Santa Cruz." Calif. Political Code, 1872, § 3946. Having in mind the definition of the phrase "by the ocean shore" in § 3907 of the same enactment (*supra,* p. 21a), it is clear that this also described a line three miles from land.

In 1919, following the creation of Ventura County, Santa Barbara County was redescribed (Calif. Political Code, § 3950; Calif. Stats. 1919, c. 470, § 43, p. 900)* as "Beginning at the western corner of Ventura" ("E" on our map), and proceeding north and west to and down the Santa Maria River "to a point in the Pacific ocean opposite the mouth of said river, forming northwest corner; thence southeasterly, by the ocean shore, to the place of beginning; including the islands of Santa Barbara, San Miguel, Santa Rosa, and Santa Cruz." Here we encounter the insuperable difficulty in California's position, mentioned above: that Santa Barbara County includes Santa Barbara Island, while Ventura County includes San Nicolas. California has never suggested how this can be accomplished by continuous lines, and it is obvious that it cannot. One county would cross over the other. See U.S. Exh. J(2), and Tr. 1290–1293. Subsequent descriptions of Santa Barbara County have been substantially the same. Calif. Stats. 1923, c. 160, § 43, p. 365; Calif Government Code, 1947, § 23142, Calif. Stats. 1947, c. 424, p. 1072.

We think it is undeniable from this review of the history of the boundaries of the five southern coastal counties that the Legislature has consistently put their boundaries three miles from the mainland shore, always impliedly and sometimes expressly recognizing that the State boundary followed the same course, and that the islands were separate adjuncts and not included in any "overall unit area" as now claimed by California.

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*The 1919 enactment was not invalidated as to this and other boundaries which it merely made more definite and did not change. *Mundell* v. *Lyons*, 182 Cal. 289, 293, 187 Pac. 950. See *supra*, 24a.

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